

1 IN THE CIRCUIT COURT OF OHIO COUNTY
2 WHEELING, WEST VIRGINIA
3

4 IN RE:

5 TOBACCO LITIGATION CASE NO. 00-C-6000
6 MEDICAL MONITORING CASES
7

8 * * *
9

10 JURY TRIAL
11

12 Whereupon the above-entitled matter came on for
13 hearing before the Honorable Arthur M. Recht at the
14 Ohio County Courthouse, Wheeling, West Virginia, and
15 the proceedings are as follows.
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20 VOLUME 3-B
21

22 September 10, 2001
23

24 1:15 p.m.
25

26 * * *

1 APPEARANCES:

2
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21 (There are other counsel representing interested
22 parties also present in the courtroom gallery.)
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24

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1 Monday Afternoon Session
2 September 10, 2001
3 1:15 p.m.
4 -- -- --
5 P R O C E E D I N G S
6 -- -- --
7 (In open court with a jury present.)
8 THE COURT: All right. Be seated, please.
9 Is everybody all right?
10 All right. Opening statements, Mr. Furr?
11 MR. FURR: Thank you, Your Honor.
12 Your Honor, may I approach and hand you a copy
13 of my boards so you can follow?
14 May it please the Court, counsel, good
15 afternoon, ladies and gentlemen.
16 I met most of you but not all of you during
17 jury selection, so let me begin by introducing
18 myself. I'm Jeff Furr, and I was born and raised
19 here in West Virginia. And just like Mr. Segal, I
20 will always consider Charleston to be my hometown.

21 I now live in Winston-Salem, North Carolina,
22 and I represent the R. J. Reynolds Tobacco Company,
23 which is headquartered in Winston-Salem.

24 I want to begin by talking with you about a
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1 topic that Mr. Segal discussed some this morning,
2 and that's the question about what this case is and
3 is not about.

4 And I want to do that because, after hearing
5 Mr. Segal's opening statement, you may be a little
6 confused about what the case is and isn't about.

7 I think it's important that you understand that
8 this case is not about whether you like cigarettes,
9 and this case is not about whether or not you like
10 cigarette companies.

11 Now, Mr. Segal also told you that this case is
12 not about whether the cigarette companies should
13 stay in business, but on the other hand, he put up a
14 board this morning or a document that seemed to
15 suggest something that the companies should go out
16 of business if cigarettes were found to be a risky
17 product.

18 Well, the fact is the case is not about whether
19 cigarettes should remain legal or whether the
20 companies should stay in business. You see, our
21 society addressed the smoking and health issue a
22 long time ago.

23 When the first scientific studies were
24 published linking smoking with disease risk, our
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1 society determined that the proper course for our
2 society would be that cigarettes would remain a
3 legal product, and that adults would be free to
4 smoke them, but that they would carry a warning;
5 they would advise smokers of the health risks of
6 cigarettes.

7 And we are not here to second guess society's
8 choice about whether cigarettes should be legal or
9 about whether the companies should go out of
10 business.

11 Instead, we are here to address the very
12 specific legal claims that the plaintiffs have made
13 in this lawsuit. You heard about these from
14 Mr. Segal this morning.

15 Primarily the plaintiffs are claiming that
16 cigarettes are a defective product; and that,
17 because smokers have smoked them, that these tobacco
18 companies should be forced to pay for them to
19 receive medical monitoring for the rest of their
20 lives, regardless of whether they quit smoking or
21 not, and while most of them continue to smoke.

22 Well, the truth is, ladies and gentlemen, that
23 most of what Mr. Segal talked to you about really
24 has nothing to do with the legal claims in this
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1 case. Most of it was designed to distract you from
2 the legal issues.

3 It was designed to anger you at the cigarette
4 companies in his effort to try to convince you to
5 force these companies to pay for a medical
6 monitoring program that doesn't exist anywhere else
7 in the country.

8 What I'm going to talk to you about is evidence

9 that's relevant to the legal claims in this case. I
10 think, ladies and gentlemen, that what you are going
11 to see is that there really are only a few sets of
12 facts that you need to know and understand in order
13 to decide the legal claims that are actually at
14 issue in this case.

15 And here they are.

16 Number one, most of the plaintiffs are current
17 smokers who are not sick and are not claiming to be
18 addicted.

19 Number two, smokers have long known the risks
20 of smoking, and plaintiffs do not claim that class
21 members were misled or underappreciated the risk of
22 smoking.

23 Number three, plaintiffs' medical monitoring
24 program is not recommended by medical or public

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1 health organizations because it has not been shown
2 to be safe, accurate and effective.

3 Number four, cigarettes are inherently risky,
4 but they are not a defective product.

5 And number five, quitting smoking is the key to
6 reducing the health risks of smoking, not medical
7 monitoring.

8 Now, throughout the remainder of my opening
9 statement, what I'm going to do is describe for you
10 what the evidence will be that will demonstrate that
11 these indeed are the facts of this case.

12 As I have said, most of the plaintiffs are
13 current smokers. Ladies and gentlemen, Mr. Segal
14 spent a lot of time this morning talking to you
15 about events that occurred in the '50s, the '60s,
16 the '70s and the '80s.

17 Well, the fact is this is not a case about the
18 smoking in the '50s, '60s, '70s or '80s. This is a
19 case about today's smokers and tomorrow's smokers.
20 We estimate that about 80 percent of the plaintiffs
21 in this class are current smokers. In order to
22 qualify to be in the case, by definition, they have
23 to have bought and smoked cigarettes after January
24 of 1995.

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1 There is a good possibility that there are
2 members of this class that didn't even start smoking
3 until the mid-1990s. It's important to understand
4 that the plaintiffs are current smokers, and they
5 are not sick.

6 You heard a lot of talk this morning about
7 disease causation, about lung cancer, about chronic
8 obstructive pulmonary disease. None of the
9 plaintiffs in this case have those diseases.

10 None of the plaintiffs in this case have lung
11 cancer. None of the plaintiffs in this case have
12 chronic obstructive pulmonary disease. None of the
13 plaintiffs in this case have any smoking-related
14 disease. If they did, they couldn't be a member of
15 this class.

16 All this discussion about disease causation
17 this morning really has very little to do with this
18 class of healthy smokers.

19 You also heard a lot of talk by Mr. Segal about
20 the advertising that the companies do. And, by my
21 count, he put up three different boards trying to

22 illustrate for you how much the cigarette companies
23 spend on their advertising.

24 But the truth is that why people begin to smoke
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1 and why people continue to smoke is not at issue in
2 this case. At the end of the case, when you are
3 asked to answer those special interrogatories that
4 Mr. Segal described, there is not going to be a
5 question for you to consider about why people begin
6 to smoke or why people continue to smoke. And all
7 this talk about the advertising dollars really has
8 nothing to do with any of the issues in this case.

9 Finally, ladies and gentlemen, Mr. Segal this
10 morning talked a great deal about cigarettes being
11 vehicles for the delivery of nicotine. And a couple
12 times he described nicotine as a pharmacologically
13 active substance or a habit-inducing substance.

14 Well, the reason he's doing that is, he wants
15 you to think about a picture.

16 MR. SEGAL: Your Honor, I object. May we
17 approach quickly?

18 THE COURT: All right.

19 (The following proceedings were had at sidebar
20 out of the hearing of the jury.)

21 MR. SEGAL: Your Honor, my objection goes to
22 the argumentative nature. Several times Mr. Furr
23 has said Mr. Segal did this for this reason, and I
24 let him go for a while.

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1 What he's doing now is constantly saying he's
2 not using this evidence for this, he's not -- the
3 point of the statement is to tell the jury what his
4 evidence is, not how he disagrees with my evidence
5 or what I said that I was trying to prove.

6 And he keeps saying he put up irrelevant
7 evidence, he put up evidence that didn't mean that;
8 it means this.

9 MR. RODES: It would have been an improper
10 thing for us to have done --

11 THE COURT: One at a time. Let me just
12 respond.

13 In your opening, I permitted areas in that were
14 argument. It was a good opening argument, but I
15 permitted it, just the same as I'm going to permit
16 the defendants to do the same thing. Because I
17 don't think this is the kind of case that you will
18 cross the line into those areas.

19 I permitted it with you, and I'm going to
20 permit it with Mr. Furr. Try to keep it to a
21 minimum, as I instructed you. But it's very
22 difficult in this kind of case to deal with that.

23 MR. SEGAL: But I did not target their evidence
24 in my statement. I told the jury what my evidence

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1 would be, and I understand the Court granting me
2 latitude. I'm not asking they not be granted
3 latitude.

4 THE COURT: You did it in other areas also,
5 whether or not you intended to do it. But you did
6 it in terms of attacking them. You set theirs up
7 because you -- listen.

8 MR. SEGAL: I did that, yeah, absolutely. I
9 knew what was coming, and so I said what our

10 evidence would be on that.
11 MR. FURR: It's the other side of the same
12 coin.
13 MR. RODES: Your Honor, he's attributing an
14 improper motive to what we are doing. He's
15 specifically impugning the integrity of the
16 plaintiffs' lawyers.
17 The Court has instructed and will instruct that
18 addiction is not an issue here, and he is saying
19 that we are trying to get it in by the back door.
20 He's accusing us in in front of the jury of doing
21 something improperly. It's highly prejudicial.
22 MR. FURR: If I am, I will pay the price for
23 it.
24 THE COURT: I do agree, don't make it personal.

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1 MR. FURR: Okay.
2 THE COURT: That's not the way to do it. Do it
3 as objectively as you can.
4 MR. FURR: I will focus on the evidence.
5 THE COURT: But listen, when it comes to both
6 the opening and closing arguments, as long as it's
7 confined to the evidence, I'm going to let you --
8 give you all a great deal of latitude. That's the
9 way I see how the case is going, it's not textbook,
10 but it is the best we have got.
11 (In open court:)
12 THE COURT: All right. Do you want to
13 continue, Mr. Furr?
14 MR. FURR: Thank you.
15 Ladies and gentlemen, as I was saying, this
16 evidence about nicotine is designed to raise in your
17 mind a question of addiction. So it's very
18 important to understand the role addiction doesn't
19 play in this case.
20 There is no claim in this case that any member
21 of the class is addicted. There is no claim in this
22 case that any member of the class can't quit
23 smoking. There is no claim in this case that
24 whether or not the plaintiffs need medical

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1 monitoring has anything to do with addiction.
2 The plaintiffs' position is that addicted, not
3 addicted, it doesn't matter. Smokers need medical
4 monitoring, regardless of addiction status. So
5 addiction has nothing to do with the plaintiffs'
6 legal claims in this case.
7 It's something I should say about addiction,
8 ladies and gentlemen. Addiction is a word that
9 means a lot of things to a lot of different people.
10 But let me tell you one thing it doesn't mean. It
11 doesn't mean that you can't quit.
12 There are 50 million ex-smokers in the United
13 States. Every year two million more Americans put
14 their cigarettes down and never pick them up again.
15 That's a number of quitters each year, approximately
16 equal to the entire population of West Virginia.
17 So one thing that's going to be very clear is
18 that addiction does not mean that you can't quit.
19 The second set of facts that's important to
20 understand in this case and the legal claims in this
21 case are that smokers have long known the risks of
22 smoking, and plaintiffs do not claim that class

23 members were misled or underappreciated the risks of
24 smoking.

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1 Now, this morning there was a great deal of
2 discussion about what the companies were saying
3 internally versus what they were saying externally
4 about smoking causation.

5 What you need to keep in mind is, none of that
6 had anything to do with the plaintiffs in this
7 class. The plaintiffs are not claiming that they
8 were ever misled by anything that the cigarette
9 companies said. The plaintiffs are not claiming
10 that they were ever deceived by anything the
11 cigarette companies said.

12 The plaintiffs are not claiming that anything
13 that the companies did or did not do or said or did
14 not say did anything to undermine the fact that they
15 know that smoking is a risky thing to do. Now, it's
16 not surprising that they are not claiming that,
17 because everyone knows that smoking is a risky thing
18 to do.

19 Mr. Segal talked to you this morning about
20 warnings, and he said several times that warnings
21 have nothing to do with this case. The fact is that
22 warnings are very important in this case because
23 these companies are entitled to have their conduct
24 judged by the historical context in which it

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1 occurred. And one of the important components of
2 that historical context is the warnings.

3 This is a back of Camel cigarettes
4 marketed by my client, the R. J. Reynolds
5 Tobacco Company. On the side of this pack of
6 cigarettes, it states, Surgeon General's
7 warning: Smoking causes lung cancer, heart
8 disease, emphysema and may complicate
9 pregnancy.

10 Now, in order to be a class member, as was
11 explained to you this morning, you had to have
12 smoked five pack years. Stated a different way,
13 that means you had to have smoked a minimum of
14 36,000 cigarettes, and that means that each and
15 every one of these class members has, at a minimum,
16 picked up a cigarettes with the warning on the side
17 of it 36,000 times.

18 And, and the warnings also appear in all
19 cigarette advertisements. It's likely that most of
20 the members of this class have never smoked a
21 cigarette without the warnings on the side of the
22 pack.

23 You see, the first warnings appeared about 35
24 years ago, in 1966, when Congress decided that the

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1 solution to the smoking problem in our country was
2 to allow adults to be free to smoke cigarettes
3 notwithstanding their risk, but to require a warning
4 on the side of the pack.

5 And Congress decides what that warning will be,
6 and I believe that, at the end of this case, His
7 Honor will instruct you that that warning is
8 adequate as a matter of law.

9 There is no claim in this case that the warning
10 is inadequate. There is no claim in this case that

11 there should have been additional warnings or
12 another warning. Those warnings are adequate as a
13 matter of law to inform smokers of the health risks
14 of smoking.

15 But despite how impactful these warnings are,
16 they are really just the tip of the iceberg with
17 respect to the historical conduct -- context in
18 which the companies' conduct took place regarding
19 the general awareness and common knowledge of the
20 health risks of smoking.

21 On this board, what I have done is depict for
22 you some of the sources by which we all learn about
23 the health risks of smoking. I have mention the
24 Surgeon General's warning.

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1 In addition, the mass media, both here in West
2 Virginia and nationally, has carried thousands and
3 thousands and thousands of articles about the health
4 risks of smoking since the 1950s.

5 Here in West Virginia, just like everywhere
6 else, when you go to your doctor, if you are
7 smoking, one of the issues that comes up is the
8 health risks of continuing to smoke cigarettes.

9 Our popular culture, the songs we listen to,
10 the movies we watch. You are going to see today
11 that, throughout the past five decades, there have
12 been many, many songs and movies that have carried
13 in them a message about the health risks of smoking.

14 Our government, through the Surgeon General and
15 other federal agencies, has gone to extraordinary
16 means to educate the public about the health risks
17 of smoking.

18 There exists literally hundreds of groups in
19 the United States whose sole purpose is to educate
20 the public about the health risks of smoking.

21 And of course, another source that we all learn
22 about smoking and many other things from are family
23 and friends.

24 Now, Mr. Newbold, who is Lorillard's lawyer,

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1 who is the gentleman sitting at the end of the
2 table, is going to do an opening statement later.
3 And in that opening statement, he's going to review
4 with you many of the ways in which these media were
5 used to bring home the message about smoking and
6 health to West Virginians in particular.

7 One fact is going to be indisputable, though.
8 The message got through, it got through loud and
9 clear, and it got through a long time ago.

10 You are probably familiar with Roper and Gallup
11 polls. Those are organizations that poll Americans
12 about their awareness and understandings of various
13 issues.

14 As long ago as the '50s and '60s Roper and
15 Gallup polls were conducted to determine how high
16 the level of awareness is in our society about
17 smoking and health.

18 And what they found, and this is their word and
19 not mine, but, as long ago as the '50s, there was a
20 phenomenally high level of the health risks of
21 smoking in our society.

22 The evidence of universal awareness of smoking
23 and health is going to be overwhelming. That's why

24 there is no claim in this case that these plaintiffs
621

1 don't know the health risk.

2 I now want to turn to a different topic, and
3 that's a topic that you heard precious little about
4 this morning. And, by the time this case is over,
5 you are going to understand why it wasn't
6 prominently featured in plaintiffs' opening. And
7 that's the whole topic of medical monitoring.

8 In this case, what the plaintiffs are doing is
9 they are asking you to force these companies
10 essentially to become health insurers, to pay for
11 periodic medical monitoring testing for these
12 plaintiffs while they continue to smoke for the rest
13 of their lives.

14 The deal that plaintiffs want you to award goes
15 like this. Smoke a pack of cigarettes each day for
16 five years, and then receive periodic medical
17 testing for the rest of your life.

18 As Mr. Segal said this morning, under
19 plaintiffs' plan, there is no requirement that the
20 plaintiffs quit smoking in order to receive this
21 testing. There is no requirement that the
22 plaintiffs even plan to quit smoking some day.

23 The plan that they are going to try to convince
24 you to award is completely unrestricted. It's

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1 completely open ended. You heard me tell you that
2 about 80 percent of the plaintiffs are current
3 smokers. Under plaintiffs' plan, they could even
4 increase the amount of cigarettes they are smoking
5 and still be eligible for medical monitoring.

6 Obviously, if 80 percent of the plaintiffs are
7 current smokers, 20 percent of them have quit.
8 Under plaintiffs' plan, those 20 percent of the
9 class that are former smokers could even begin
10 smoking again and receive medical monitoring.

11 You are going to find that the evidence will
12 show that this medical-monitoring program that the
13 plaintiffs are going to try to convince you to award
14 is a plan that was created by the plaintiffs'
15 lawyers and their well-paid expert witnesses.

16 This is not a plan that was created by the
17 public health community. This is not a plan that
18 was created by medical organizations. This is a
19 plan that was designed by the lawyers and their
20 witnesses, and it was designed to be as large and
21 expensive and unrestricted as possible. It's not
22 fair to the defendants, and it's not going to help
23 the plaintiffs.

24 The plaintiffs' medical-monitoring program is

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1 not recommended by medical or public health
2 organizations because it has not been shown to be
3 safe, accurate and effective.

4 This morning, you heard a lot about this plan
5 and how, at the end of the case, you were going to
6 be asked whether it was possible to diagnose disease
7 using these tests at a point in time that's earlier
8 than if the smoker would wait until he became
9 symptomatic.

10 Well, there is another question that you are
11 going to be asked at the end of the case, and it

12 wasn't mentioned this morning. And the question you
13 are going to be asked at the end of the case is
14 whether the plaintiffs have demonstrated that the
15 medical-monitoring program they have asked for is
16 reasonably necessary. And the answer to that
17 question is going to be no.

18 I want to back up for just a moment and talk to
19 you a little bit about medical monitoring in
20 general.

21 Now, from an early age, one of the things we
22 all learn is, preventative healthcare is very
23 important. There is no question about that. And
24 medical monitoring is a component of preventative

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1 healthcare that has a role to play in our healthcare
2 society. There is no debate about that.

3 But medical monitoring is only used when it has
4 been demonstrated to be safe, accurate and
5 effective. And what the doctors mean by safe is
6 whether the test, itself, and the reasonably
7 necessary follow-up procedures are reasonably safe.

8 By accurate, what the doctors mean is whether
9 the test accurately is able to distinguish between
10 people that really have the disease and people that
11 do not have disease.

12 But for our purposes, the most important
13 standard that doctors use to evaluate medical-
14 monitoring tests is effectiveness. It's sometimes
15 referred to in the scientific literature as the gold
16 standard of medical monitoring,

17 And what it means is whether the test has been
18 demonstrated to identify potential disease at a time
19 when the available therapies can make a difference
20 in the outcome as opposed to waiting until the
21 patient becomes symptomatic.

22 These are the standards that doctors use in
23 determining whether or not a medical-monitoring test
24 should be performed.

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1 There are, of course, some excellent examples
2 of tests that meet these criteria. For example,
3 mammograms are used to detect breast cancer earlier
4 because they have been demonstrated to be safe,
5 accurate and effective.

6 Pap smears, of course, are well recognized as a
7 useful medical monitoring tool to diagnose cervical
8 cancer earlier because it's been demonstrated to be
9 safe, accurate and effective.

10 But the test that plaintiffs are asking you to
11 award for healthy smokers have not been demonstrated
12 to be safe, accurate and effective. In fact, right
13 now there are a number of large scale studies that
14 are being designed and performed to try to get at
15 this very issue.

16 You see, there are no studies that have been
17 performed or completed or published yet that
18 demonstrate that these tests that plaintiffs want us
19 to pay for are effective. Those studies are just
20 now being designed and performed.

21 The tests that plaintiffs are asking you for
22 are in the experimental or unproven stage. What
23 plaintiffs are asking you to do is to get out ahead
24 of the medical science.

1 You see, this medical monitoring is not the
2 standard of care. It's not the standard of care
3 nationally, and it's not the standard of care here
4 in West Virginia. And as a result, medical
5 organizations do not recommend that healthy smokers
6 get these tests.

7 You see, the health risks of smoking have been
8 so widely known and known for so long that the
9 question of whether smokers should receive medical
10 monitoring is not a new question. It's a question
11 that doctors and scientists have considered for some
12 time. And their answer has been no.

13 On this chart I have listed for you the medical
14 organizations and public health organizations that
15 have considered the question of whether healthy
16 smokers should receive medical monitoring.

17 Let's look at the column for lung cancer. All
18 of these organizations have taken a position on this
19 question. The National Cancer Institute, the
20 American Cancer Society, the Society for Thoracic
21 Radiology, the American Academy of Family
22 Physicians, the American College of Physicians, the
23 Association of University Radiologists, the American
24 Thoracic Society, the American Lung Association, the

1 American College of Radiology, the United States
2 Surgeon General, the United States Preventative
3 Services Task Force, the West Virginia Bureau for
4 Public Health, the National Heart, Lung and Blood
5 Institute, the American College of Chest Physicians.

6 Ladies and gentlemen, there is an overwhelming
7 scientific and medical consensus that these medical
8 monitoring tests are not recommended for healthy
9 smokers to screen for lung cancer.

10 And when you turn to chronic obstructive
11 pulmonary disease, which is a synonym for emphysema
12 we have been using today, the picture is much the
13 same. There is an overwhelming consensus these
14 tests are not recommended.

15 You will see, down here at the bottom, I put
16 two question marks, and the reason is that
17 plaintiffs have a witness who was mentioned this
18 morning, Dr. Gaziano, who in previous testimony has
19 said that, recently, these two organizations have
20 changed their mind and are now recommending
21 spirometry.

22 We think he's wrong. We don't think they have
23 changed their position. We are going to cross-
24 examine him on this issue, and you are going to have

1 to be the judge.

2 But the fact is that nothing Dr. Gaziano is
3 going to say about these organizations does anything
4 to change the overwhelming scientific and medical
5 consensus that medical monitoring is not recommended
6 for healthy smokers.

7 You know, if medical monitoring had been
8 demonstrated to help smokers, you know that these
9 organizations would be recommending it. These are
10 no friends of the tobacco industry.

11 This morning Mr. Segal labeled some of these as
12 the adversaries of the tobacco industry. If it

13 worked, they would be recommending it.
14 Let me talk about just a couple of them with
15 you. The United States Surgeon General is the
16 number one public health authority in this country.
17 The United States Surgeon General's office is also
18 the number one authority on the medicine and science
19 related to smoking and health in this country.
20 It was the Surgeon General's office in the
21 landmark report in 1964 that told the American
22 public that smokers get more lung cancer than
23 nonsmokers; and that the scientific data was now
24 sufficient to, in their judgment, determine that

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1 smoking caused lung cancer.

2 Well, since that time, in 1964, the United
3 States Surgeon General has issued 27 subsequent
4 reports on smoking and health, most of them are
5 several hundred pages long, and they review
6 thousands of scientific references.

7 And not once, not once since 1964, has the
8 Surgeon General ever recommended, ever recommended
9 that smokers receive medical monitoring.

10 The United States Preventative Services Task
11 Force is an important group. The United States
12 Preventative Service Task Force is a group that was
13 funded by the Department of Health and Human
14 Services, which is the same agency that funds the
15 Surgeon General's office.

16 And they were funded to produce this book.
17 It's called the Guide to Clinical Preventative
18 Services.

19 Literally hundreds of scientists were funded by
20 the government to review thousands of scientific
21 articles and distill them down to what they would
22 recommend for clinical preventative services for the
23 American public.

24 And part of the recommendations that they have

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1 made have to do with medical monitoring. And in
2 this book, which is the most authoritative source in
3 medicine and science on preventative healthcare
4 services, there is not one, not one single
5 recommendation that healthy smokers receive the
6 medical-monitoring tests that the plaintiffs'
7 lawyers would like for you to force the tobacco
8 companies to pay for.

9 Now, there is one more let me mention to you
10 because it's so close to home. The West Virginia
11 Bureau for Public Health. The West Virginia Bureau
12 for Public Health is the leading state agency in
13 West Virginia charged with formulating public
14 healthcare policy.

15 And among the things they do is, they put out
16 these books. This is titled "A Healthier Future For
17 West Virginia, Healthy People 2010." About ten
18 years ago, there was one called the healthy -- West
19 Virginia Healthy People 2000.

20 And in these books, the West Virginia Bureau of
21 Public Health makes recommendations as to what
22 healthcare policy should be in West Virginia. And
23 frequently they make recommendations about the
24 medical monitoring that West Virginians would

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1 receive.

2 For example, with respect to decreasing the
3 rate of breast cancer in West Virginia, they
4 recommend mammograms. For decreasing the impact of
5 cervical cancer in West Virginia, they recommend Pap
6 smears. For decreasing the impact of smoking in
7 West Virginia, they don't recommend medical
8 monitoring.

9 There is a whole chapter in the West Virginia
10 Healthy People 2010 on smoking and its impact on
11 West Virginians. There is not a single
12 recommendation in the book that West Virginia
13 smokers get medical monitoring.

14 Instead, what they recommend is quitting. They
15 recommend that the way to decrease the impact of
16 smoking on the health of West Virginians is to quit.

17 So you are going to see that the evidence in
18 this case is that there absolutely is no evidence
19 that the tests that plaintiffs were asking for will
20 improve the health of smokers, and there is an
21 overwhelming medical and scientific consensus that
22 these tests should not be performed on healthy
23 smokers.

24 Not only will they -- have they not been

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1 demonstrated to benefit healthy smokers, there is a
2 significant concern among doctors, including many
3 that you will hear in this case, that medical
4 monitoring may actually harm healthy smokers. And
5 there are three major concerns that the doctors
6 have.

7 The spiral or helical CT scans that were spoken
8 about this morning to screen for lung cancer are a
9 very nonspecific, inaccurate test. They don't just
10 detect lung cancer. They detect anything going on
11 in the lung

12 And so there is a great deal of concern that
13 there will be a large number of false positives.
14 And what I mean by that is people are going to be
15 told that they tested positive with this test, then
16 they will have to undergo expensive and potentially
17 dangerous follow-up testing only to learn that, in
18 fact, they don't have lung cancer.

19 Based on the limited scientific studies that
20 have been done to date, if this class of 250,000
21 people were to receive screening, helical CT scans,
22 over 100,000 West Virginia smokers would be told
23 that you may have lung cancer only to have to pay
24 for follow-up testing that is expensive and

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1 potentially dangerous to learn that they, in fact,
2 do not have lung cancer.

3 Second, there is a concern that smokers may
4 wrongly believe that medical monitoring will detect
5 disease early enough to be cured.

6 Unfortunately, as I just told you, it's not
7 the case. There is no data, there is no scientific
8 studies yet showing that these tests actually detect
9 disease at a time which will permit cure.

10 But there is a concern that smokers who receive
11 this medical monitoring will view it as a license to
12 continue smoking with the wrong notion that, if they
13 ever do develop the disease, then monitoring will

14 catch it in time so that they could be treated.
15 There is no proof that it can be.

16 Finally and very importantly, there is a
17 concern that medical monitoring may reduce a
18 smoker's motivation to quit. Mr. Segal told you
19 this morning that every witness is going to tell you
20 that the best thing a smoker can do to reduce their
21 health risk is quit.

22 There is a concern that, again, smokers may
23 view the availability of medical monitoring as a
24 license to continue smoking, and it may actually

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1 discourage them from quitting, which is the most
2 important thing that smokers can do to improve their
3 health.

4 As I said, ladies and gentlemen, at the end of
5 this case, among the questions that you are going to
6 be asked will be the question as to whether medical
7 monitoring has been shown to be reasonably necessary
8 for healthy smokers who are continuing to smoke, and
9 the evidence is going to demonstrate that the answer
10 is no; that what those smokers need to do is quit to
11 reduce their risk, not receive medical monitoring.

12 I'm going to turn to a different topic now, and
13 that's this topic of whether cigarettes are a
14 defective product, which is one of the plaintiffs'
15 principal legal claims in the case.

16 The evidence will be that cigarettes are an
17 inherently risky product, but they are not
18 defective. You see, plaintiffs have got it half
19 right. They are risky. We don't dispute that. But
20 they are not defective.

21 This would be a short case if all the
22 plaintiffs had to do were prove to you that
23 cigarettes were a risky product that can cause
24 disease in some smokers because the companies all

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1 admit that it does just that.

2 The companies maintain web sites that state
3 that cigarettes can cause disease in some smokers.
4 The companies advise smokers to rely upon health
5 authorities to make decisions about smoking, not to
6 us.

7 But just because a product is risky does not
8 make it defective. In our society there are a lot
9 of risky products that are not defective. Guns can
10 shoot you, knives can cut you, and we all
11 unfortunately know what eating too much fatty food
12 can do to you.

13 But that doesn't make those products
14 defective. Those are inherent risks of those
15 products, and unfortunately the inherent risk of
16 cigarettes is that, if you smoke them, you will
17 develop an an increased risk of developing lung
18 cancer and emphysema.

19 But that is a natural inherent consequence of
20 using the product. It has nothing to do with
21 anything that the cigarette manufacturers do.

22 You see, at the end of the case you will not be
23 asked if the product is risky, but you are going to
24 be asked if the product is defective. And under

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1 West Virginia law, there is a very specific test

2 whether the products are defective, and His Honor
3 will instruct you at the end of case the factors you
4 are to consider in determining whether the product
5 is defective.

6 For now I will just tell that you the focus is
7 not only on the risk of the product, but the focus
8 is also on the manufacturer's conduct, whether a
9 reasonably prudent manufacturer could have made the
10 product safe in light of the state of the art of the
11 manufacturing process and the labels and warnings
12 that the product carries.

13 So throughout this case for the defense, what
14 we are going to try to do is present to you evidence
15 that addresses the factors that you are going to
16 need to consider, not just whether cigarettes are a
17 risky product or whether they are also a defective
18 product. I'm going to begin to talk to you about
19 some of that evidence right now.

20 First, as I was saying, cigarettes are an
21 inherently risky product. You see, cigarettes
22 consist of primarily the plant tobacco. And when
23 you light tobacco and burn it, it produces a smoke
24 that contains a set of chemicals that are

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1 carcinogenic and irritating and potentially capable
2 of inducing emphysema.

3 But that's how most organic plants are. For
4 most plants, if you light them and burn them, you
5 will produce a smoke that contains dangerous
6 substances. There is nothing about tobacco that's
7 different that way.

8 But what's important is that the chemicals that
9 are related to lung cancer and emphysema in
10 cigarette smoke are a natural part of burning
11 tobacco.

12 It's not something the manufacturer put there.
13 They don't have anything to do with the
14 manufacturer's conduct. They are an inherent part
15 of tobacco smoke.

16 If you were to go to the nearest tobacco field
17 in West Virginia -- and there are hundreds of them
18 in West Virginia. But if you were to go to the
19 nearest one and take a match and light a plant
20 growing in the field, the smoke that would be
21 generated would contain the same carcinogens and
22 chemicals that a cigarette contains that induce the
23 risk from smoking.

24 And that is because those chemicals come as a

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1 natural result of combustion or burning process of
2 tobacco, not from anything that the manufacturers
3 do.

4 Now, Mr. Segal made a very serious claim this
5 morning. He claimed that these cigarette
6 manufacturers have not studied their product; and
7 that they have not attempted to make cigarettes
8 safer.

9 After you have heard the evidence in this case,
10 I think that you are going to be absolutely
11 astounded that he would make such a claim to you.
12 The evidence in this case is going to absolutely
13 blow that claim out of the water.

14 Fifty years ago when the health risks of

15 smoking first started to be reported in the
16 scientific literature, these companies began
17 studying and attempting to modify their cigarettes,
18 and they did it in a big way.

19 In the past fifty years, these companies have
20 spent billions of dollars trying to make cigarettes
21 safer. They have hired hundreds of scientists who
22 have devoted their careers to trying to make
23 cigarettes safer.

24 The evidence will be that they have conducted
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1 themselves as reasonably prudent manufacturers with
2 respect to trying to understand and modify
3 cigarettes and make them as safe as they can be and
4 still acceptable to consumers.

5 But despite all that work, no one knows how to
6 make a commercially acceptable, safe cigarette. You
7 see, it's not just the four cigarette companies that
8 are defendants in this case.

9 Foreign cigarette companies, foreign
10 governments, the United States government, private
11 research institutions in the United States. And of
12 course these companies have all been working for
13 fifty years to try to find a way to make a
14 commercially acceptable, safe cigarette, and no one
15 knows how to do it.

16 It's not me saying that. The plaintiffs'
17 witnesses are going to tell you the same thing. No
18 one knows how to make a commercially acceptable safe
19 cigarette.

20 You see, there are really two components to
21 it. First, you have to make the cigarette safer.
22 That's actually the easy part. The truth is that
23 everyone who has studied this issue knows how to
24 make cigarettes safer.

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1 All you have to do is put a filter on the end
2 of a cigarette that blocks all the smoke from coming
3 through their product so all the smoker inhales is
4 air, just like we are all breathing right now, and
5 you have a safe cigarette.

6 But that's only half the equation. It has to
7 be commercially acceptable. It has to be a
8 cigarette that smokers are willing to switch to from
9 the products that they are currently smoking.

10 A safer cigarette that smokers won't smoke
11 doesn't do anyone any good, and that's what the
12 plaintiffs' witnesses will tell you.

13 Mr. Segal talked a little bit this morning
14 about cases involving automobiles. Well, we hear a
15 lot about cases involving automobiles. The fact is
16 that, for example, GMC and Ford know how to make a
17 perfectly safe car that will be perfectly crash-
18 worthy.

19 All you have to do is replace the sheet metal
20 with steel about an inch thick, create a car that
21 weighs about 10,000 pounds, put an engine in it that
22 will only allow it to go about five miles and hour,
23 and I promise you you will have nearly a perfectly
24 save and crash-worthy vehicle.

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1 The problem is, you don't have a car any more;
2 you have a tank. And people aren't going to turn in

3 their GMCs and Fords to drive a tank that drives
4 five miles an hour down the road.

5 It's the same way with cigarettes. If a
6 cigarette doesn't taste good to smokers, they won't
7 trade for it, regardless of what the safety benefits
8 might be of it.

9 You heard this morning from Mr. Segal that the
10 state of the art with respect to cigarette design is
11 a factor for you to consider. Well, I promise you,
12 ladies and gentlemen, there is going to be no
13 evidence that the cigarettes that these companies
14 make fail to comply with the state of the art.

15 I told you there have been a number of groups
16 researching cigarettes for the past fifty years.
17 There has never been a single important innovation
18 with respect to the safety of cigarettes that these
19 companies were not the first to identify and
20 implement.

21 Nobody else has ever identified a way to make
22 cigarettes that these companies hadn't already found
23 and weren't already using.

24 The plaintiffs cannot and will not claim that

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1 the companies failed to comply with the state of the
2 art. Instead, what you heard this morning was that
3 the state of the art wasn't all that it should be
4 because the companies failed to develop technology
5 to drive the state of the art.

6 You heard that, because the companies
7 participated in the debate at various times about
8 what cigarettes had been shown and had not been
9 shown to do, that that somehow hindered our progress
10 in trying to develop safer cigarettes.

11 You heard we spent all our time trying to
12 maintain some type of position about whether
13 cigarettes were dangerous or not as opposed to
14 trying to develop cigarettes that were safer.

15 All of that is absolutely wrong. The companies
16 participated in the debate about smoking and health,
17 but they never, ever allowed that debate to get in
18 their way of trying to make cigarettes as safe as
19 they could.

20 While they participated in that debate, on one
21 hand, they always assumed -- for the purposes of
22 product development, they always assumed that
23 cigarettes had been shown to be dangerous and had
24 been shown to cause the diseases that they had been

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1 claimed to cause, and they tried to modify the
2 products based upon that assumption.

3 In the 1950s, when the scientific articles
4 began coming out, the companies developed state of
5 the art laboratories, they purchased state of the
6 art equipment, and they hired scores of scientists
7 to begin working on how to make cigarettes safer.

8 As I told you, it's a difficult problem. But
9 what they tried to do in part was to always follow
10 the advice of the public health community. And the
11 key advice they got from the public health community
12 was to decrease the tar delivery of their products.

13 And from the early days of cigarette design and
14 modification, whether the companies have made
15 progress in making their cigarettes safer has always

16 been measured by whether the products that they make
17 have a reduced yield of FTC tar; that is, tar
18 measured using the FTC method.

19 FTC stands for the Federal Trade Commission N
20 the mid-1960s, the FTC decided that there should be
21 a uniform way to determine what the tar yield is of
22 cigarettes, and so they adopted a test that the
23 companies are required as a matter of law to use
24 every year to test their products and to report the

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1 tar yields of their products as measured by the FTC
2 method.

3 If you have ever seen cigarette advertisements,
4 cigarette advertisements always include both tar and
5 nicotine yields as measured by the FTC method.

6 Well, using that as a standard for product
7 development, which the public health community
8 recommended, in the late 1950s, a very famous
9 scientist you will hear a lot about this trial named
10 Ernst Wynder advised the companies that, if they
11 could decrease the tar yield of their product by
12 about 40 percent, they would significantly reduce
13 the cancer risks from those products.

14 I'm going to show you what the companies have
15 done with respect to the FTC tar yield of their
16 products.

17 This is a chart showing how those yields have
18 changed over time. In the early 1950s, the average
19 cigarette that a smoker bought and smoked, which is
20 what sales weighted average means, had a tar yield
21 of 38 milligrams.

22 By 1998, the average cigarette had a tar yield
23 of 12 milligrams.

24 That's a decrease of 70 percent.

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1 The same thing happened to nicotine. In 1954,
2 the average nicotine FTC yield was 2.3 milligrams.
3 At 1998 the average nicotine was .88 milligrams.

4 Again, that's about a 70 percent reduction in
5 FTC nicotine yield.

6 So when you hear that these companies hid their
7 head in the sand and did nothing to try to modify
8 their cigarette products, remember this chart. They
9 didn't stop at 40 percent. They decreased the yield
10 of the average product by 70 percent.

11 You heard that one of the reasons we didn't
12 modify the product was because we were so caught up
13 in debating whether causation had been established.

14 As I mentioned a little while ago, the Surgeon
15 General's report, there really was a critical
16 finding with respect to cigarettes and causation was
17 issued in 1964.

18 Look what had already happened by 1964 when the
19 Surgeon General first concluded that causation had
20 been established. By 1964, the FTC tar and nicotine
21 yields of cigarettes had already fallen about 35
22 percent.

23 Even before causation was established to the
24 satisfaction of the scientific community, these

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1 companies had decreased the FTC tar and nicotine
2 yield by 35 percent.

3 And there have been about 30 population

4 studies, statistical studies, of lung cancer in
5 smokers and nonsmokers. That have studied whether
6 smokers of FTC high-tar products get cancer --
7 excuse me, get more cancer than smokers of FTC
8 low-tar products.

9 And what they found is, the low-tar products by
10 the FTC method produce about on average -- and it
11 varies from study to study, somewhere between 20 to
12 30 percent less lung cancer than the high-tar
13 products. So, when you hear we have done nothing to
14 change our products, remember those studies.

15 But we didn't stop there. Since 1967, there
16 have always been cigarette brands on the market with
17 FTC tar yields less than five milligrams. Now,
18 that's not 40 percent reduction from the early
19 '50s. That's an 85 percent reduction from the early
20 1950s.

21 For the past 20 years, there have always been
22 on the market cigarettes with FTC tar yields less
23 than one milligram. That's not a 40 percent
24 reduction that Dr. Wynder called for. That's about

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1 a 95 percent reduction from the average tar, FTC tar
2 yield, of 1950 cigarettes.

3 You are going to hear from one of plaintiffs
4 own witnesses that they believe that cigarettes with
5 less than one milligram of FTC tar, in the range of
6 half a milligram, are virtually safe. That's their
7 testimony, not ours.

8 We are not claiming that these products are
9 safe. What we are claiming is these companies have
10 worked like crazy to drive the FTC tar yield as low
11 as they can for their customers.

12 Now, no one has been able to design a safe
13 cigarette. You heard some discussion this morning
14 by Mr. Segal about the Liggett Tobacco Company and
15 the Palladium cigarette that they claim was a safe
16 design.

17 Let me tell you what the evidence is going to
18 be with respect to that Liggett cigarette. That was
19 a cigarette that had a heavy metal added to it. And
20 the evidence will be that there is absolutely no
21 proof that that was a safer cigarette, and there are
22 many who thought that it might be a more risky
23 cigarette.

24 In fact, you will hear that a very famous

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1 scientist at the time named Dietrich Hoffman stated
2 in scientific publications that it would have been
3 irresponsible to market the Liggett Palladium
4 cigarette to the public with that heavy metal
5 added.

6 In addition, you are going to hear there was
7 never any proof that that was going to be a
8 commercially feasible alternative. Liggett had
9 absolutely no proof that smokers were actually going
10 to switch to that cigarette from the cigarettes they
11 currently smoke.

12 And finally, the central allegation that was
13 made this morning was that they didn't market it
14 because of something the other companies did. The
15 proof is going to be as follows: Liggett was going
16 to market it as a safer cigarette, but they didn't

17 have the evidence to establish it was a safer
18 cigarette. And they didn't market it in part
19 because they thought that, if they made claims that
20 it was a safer cigarette, that the Federal Trade
21 Commission would stop them, would issue an
22 injunction and force them to pull the product from
23 the market. That's going to be what the evidence is
24 with respect to the Liggett Palladium cigarette.

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1
2 Now, it's easy to say that we should make our
3 cigarettes safer. But it's hard to do. I don't
4 believe you are going to hear from the plaintiffs
5 any alternative design that they say is both safer
6 and has been demonstrated to be commercially
7 feasible because there is not one.
8 But that hasn't stopped the companies from
9 pouring billions of dollars into research to try to
10 come up with a safer cigarette.

11 For decades the companies have been working on
12 nontraditional cigarette products that further
13 reduce the FTC tar yield. You are going to here
14 about these products.

15 Virtually all companies have developed one
16 product or not. The company I represent, R. J.
17 Reynolds, first developed a product called the
18 Premier cigarette, and is now marketing a product
19 called the Eclipse cigarette.

20 Other companies have different products. They
21 all operate on the somewhat similar principal where
22 they try to heat instead of burn tobacco. It sounds
23 simple, but it is not.

24 The companies have developed billions of doing
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1 trying to develop these products. And they have
2 been successful with respect to the first half of
3 the equation.

4 They have been able to greatly reduce the
5 cancer causing and other chemicals in cigarettes,
6 but they haven't come up with one that tastes good
7 yet.

8 They have tried and tried, and they haven't
9 been able to come up with one that smokers will
10 switch to. But they have been working on it for 20
11 years, and they are still working on it.

12 And the reason they are doing that is really
13 twofold. One, these companies want to make the
14 safest possible product they can for their
15 customers.

16 But second -- and this is important; we will be
17 first to acknowledge it -- there is a huge financial
18 incentive to make the safest cigarette you can
19 make.

20 The first company that can make a safe
21 cigarette that smokers will switch to is going to
22 reap a huge financial bonanza, and all the companies
23 know it and of course every one of them wants to be
24 that company. But they just haven't been able to do

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1 it yet.

2 You heard this morning also and you saw a chart
3 put up having to do with the additives in
4 cigarettes. And there seem to be some suggestion

5 that cigarettes were dangerous because of the
6 additives.

7 Ladies and gentlemen, that's a red herring. It
8 is nothing but an effort to distract you from the
9 inherent risks of cigarettes. Let me tell you the
10 facts are about additives.

11 Mr. Klein, the lawyer for Philip Morris who
12 sits right next to me, is going to talk to you later
13 today about the Tobacco Working Group. It was a
14 governmentally funded group that tried to find a way
15 to make a safer cigarette between about 1968 and
16 1978.

17 They didn't succeed. Like I told you, no one
18 has yet. But one of the things they concluded was
19 that there was no evidence that it was the additives
20 in cigarettes that increased their toxicity.

21 Second, in 1985, the United States Congress
22 enacted a law that requires the companies, every
23 year, to turn over a list of every single additive
24 that they use in cigarettes to the Department of

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1 Health and Human Services. That's the agency that
2 the Surgeon General's office is a part of.

3 In turn, that law requires the Department of
4 Health and Human Services to evaluate those
5 additives and to report to Congress any time it
6 identifies a single additive that poses a health
7 risk to cigarette smoking.

8 That's been going on for about sixteen years,
9 and never once, not one time, has DHHS ever said
10 that they have identified an additive that's being
11 used in cigarettes that poses a health risk to
12 cigarette smokers.

13 Finally, and I think this is very telling, no
14 one claims that an additive-free cigarette is safe
15 or even safer than the current products. In fact, I
16 think you are going to hear from plaintiffs' own
17 witnesses that they think an additive-free product
18 might be more dangerous than the products we are
19 selling today.

20 Like I said, ladies and gentlemen, the whole
21 additive issue is a red herring. It's designed to
22 distract you from the fact that risks from
23 cigarettes are an inherent quality of the product.

24 You also heard this morning the claim that the

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1 companies did not test their products because they
2 were afraid that testing their products would
3 somehow be viewed as an admission that there is
4 something wrong with the products.

5 Ladies and gentlemen, these companies test the
6 heck out of their products. For 25 years the R. J.
7 Reynolds Tobacco Company, which is the company I'm
8 most familiar with, has been testing its cigarette
9 products.

10 They test virtually every aspect of the
11 product. They test the leaf when it comes in the
12 door. They test every component of the process of
13 manufacturing cigarettes.

14 When they are done, they test the smoke of the
15 cigarette. They test one product that's sold to
16 customers and compare it to other products. They
17 test commercially, and they do comparative testing.

18 But they don't stop there. They then test the
19 biomedical consequences of using those products.
20 They perform inhalation testing using animals, skin
21 painting testing, DNA testing.
22 You are going to hear about all this. We are
23 going to bring to you witnesses who are experts in
24 the field of cigarette design. These are scientists

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1 that have spent their professional careers trying to
2 make cigarettes as safe as they can be, and they
3 will explain all this testing to you.

4 You heard this morning that we don't test their
5 additives. What the evidence is going to be is that
6 R. J. Reynolds evaluates every single change it
7 makes in cigarettes to make sure that nothing it
8 does increases the inherent risk that's a natural
9 result of smoking cigarettes.

10 If you hear again during this case claims that
11 we don't test our products, remember this chart. I
12 guarantee you no one is going to testify that the
13 R. J. Reynolds Tobacco Company doesn't perform these
14 tests on their products.

15 There was a lot of discussion this morning
16 about cigarettes being a nicotine delivery device,
17 and there was a suggestion that the companies had
18 done something wrong with respect to concentrating
19 some of their research and development efforts on
20 nicotine delivery.

21 Well, the facts on this are going to surprise
22 you somewhat, I think.

23 First, remember nicotine is a natural
24 constituent of tobacco. It's not something that the

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1 tobacco companies put in there. It's a natural
2 constituent of the plant.

3 Second, what you are actually going to learn is
4 that the public health community encouraged the
5 companies to manipulate the nicotine delivery of
6 their products in order to try to make a safer
7 cigarette.

8 The public health community even suggested to
9 the companies techniques that they might use to try
10 to make their products safer. They suggested that
11 the companies should consider adding nicotine, for
12 example.

13 They suggested that companies should consider
14 genetically modifying the plant to change the
15 nicotine to tar ratio that's produced when the plant
16 is burned.

17 They suggested that the companies consider
18 using additives to boost the impact of nicotine.
19 These were all recommendations of the public health
20 community. And, as a reasonably prudent
21 manufacturer should have, the companies researched
22 those approaches.

23 Now, today, the plaintiffs seem to be saying
24 there is something wrong with us having focused on

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1 nicotine as part of our product development
2 efforts. That's exactly what the public health
3 community encouraged the companies to do.

4 The irony of this whole issue is, all these
5 recommendations that the public health community

6 made to us about how to make cigarettes safer
7 failed, we couldn't produce a safer product.
8 Instead, let me tell you what is actually
9 happening to nicotine in cigarettes. The evidence
10 is going to show that the tobacco in cigarettes
11 contains less nicotine than it had in it when it was
12 harvested out in the field; that the cigarette
13 manufacturers decrease the nicotine level of tobacco
14 as cigarettes are made; and that the average FTC
15 nicotine yield of cigarettes has dropped 70 percent
16 since the early 1950s.

17 In short, the evidence on this nicotine issue
18 which, as I suggested to you earlier, is being
19 raised because of the connotation it carries with it
20 with respect to addiction is as follows.

21 No member of this class is claiming they are
22 addicted. No member of this class is claiming they
23 can't quit. No member of this class is claiming
24 that they need medical monitoring because they are

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1 addicted.

2 And the public health community encouraged the
3 companies to try to control the nicotine delivery of
4 their products using techniques that I just
5 mentioned in an effort to make safer cigarettes.

6 I told you earlier -- I probably spent longer
7 than I should have -- that no one recommends the
8 medical monitoring program that the plaintiffs are
9 seeking to have you impose upon the companies.

10 And the reason no one recommends it, in
11 addition to those that I have already talked about,
12 is that quitting smoking is the key to reducing the
13 health risks of smoking, not medical monitoring.

14 Every doctor that comes here and testifies,
15 every witness that testifies, is going to tell you
16 that quitting smoking is the key to reducing the
17 health risks of smoking.

18 And let's look at that. Let's look at why, why
19 do the doctors recommend that quitting smoking is
20 the key to reducing the health risks, not medical
21 monitoring.

22 Keep in mind that plaintiffs are seeking
23 medical monitoring for two diseases. One is lung
24 cancer, and the other is COPD and emphysema.

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1 With respect to COPD and emphysema, when you
2 stop smoking, COPD and emphysema stop progressing.
3 There is something that's important to understand.
4 There is no cure for COPD or emphysema. Once you
5 have COPD or emphysema, you have it for life.

6 But, if you stop smoking before you get COPD or
7 emphysema, you will never get it from smoking
8 cigarettes. What the plaintiffs want you to do, as
9 Mr. Segal showed you this morning, is they want you
10 to force the companies to pay for smokers to get
11 spirometry testing beginning at age 40.

12 Well, if a smoker doesn't have COPD but
13 continues smoking -- I'm sorry, I didn't say that
14 right. Let me say it slightly differently.

15 If a smoker goes into a doctor's office and has
16 a spirometry test performed that shows no decrease
17 in lung function, what the doctor is going to
18 recommend that they do is quit smoking.

19 If a smoker goes into a doctor's office and has
20 a spirometry test performed that shows a decrease in
21 lung function, what that doctor is going to do is
22 recommend that they quit smoking.

23 If a smoker goes into a doctor's office and has
24 no spirometry performed, what that doctor is going
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1 to do is recommend that that smoker quit smoking.

2 And that's because there is no treatment for
3 it. If you quit smoking before you turn the age of
4 40, when the spirometry testing will be performed,
5 you will never get COPD or emphysema from smoking.

6 If you wait until you have COPD and emphysema
7 and have it diagnosed by spirometry, you are going
8 to have it for the rest of your life. That's why,
9 with respect to COPD, doctors recommend quitting
10 smoking, not medical monitoring.

11 Now, with respect to lung cancer, when you stop
12 smoking, your risk of lung cancer begins decreasing
13 and approaches that of a never-smoker in 10 to 15
14 years.

15 Now, you have to consider the importance of
16 this fact within the context of the program that the
17 plaintiffs are asking you to impose on these
18 companies. What the plaintiffs want you to do is
19 require the companies to begin paying for spiral CT
20 scans to screen for lung cancer when smokers turn 50
21 years old.

22 In this class of plaintiffs, there are huge
23 numbers of smokers who are in their 20s and 30s
24 right now. Let's pick out, for example, what the
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1 plaintiffs' plan means for a 25-year-old smoker.

2 For a 25-year-old smoker that would mean, if you
3 were to award medical monitoring, that smoker would
4 become eligible for medical monitoring 25 years from
5 now, when they turn age 50.

6 They could continue smoking for the next 25
7 years, and then the companies would have to pay for
8 medical monitoring when they turn 50.

9 But, if they would quit now at the age of 25,
10 in 10 to 15 years, there wouldn't even be any risk
11 to monitor for. Mr. Segal talked you to this
12 morning, he put up a chart saying the risk never
13 comes back down to zero if you smoked 25 to 30
14 years.

15 What he forgot to tell you, if you smoked a
16 shorter period of time, less than ten years, let's
17 say, five to ten years, by the time you quit for 25
18 years, there is absolutely no data whatsoever
19 showing that there will be any risk to monitor for.

20 So just for COPD, quitting is the answer as
21 opposed to monitoring. This is probably very clear
22 right now, but let's look at why that is.

23 Quitting reduces the risk of disease. Medical
24 monitoring does nothing to reduce the risk of
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1 developing disease. All it gives you is the
2 possibility of detecting disease.

3 Quitting can prevent a smoking-related disease
4 from ever developing. Medical monitoring only
5 catches the disease after it has already developed.

6 That's why it's quitting the doctors recommend,

7 not medical monitoring. When a smoker goes into a
8 doctor's office, they don't say why don't you keep
9 smoking for the next 25 years, and then you can get
10 medical monitoring. They don't say why don't you
11 keep smoking for one day and then get medical
12 monitoring.

13 They recommend that they quit because quitting
14 reduces disease. And you don't even have to take my
15 word for it. Take the Surgeon General's. Another
16 warning that appears on the side of cigarette packs
17 is Surgeon General's warning: Quitting smoking now
18 greatly reduces serious risk to your health.

19 Medical monitoring is not reasonably necessary
20 for healthy smokers to receive wanting to continue
21 to smoke. Quitting is the solution to smoking-
22 related disease.

23 Ladies and gentlemen, as I said when I began, I
24 believe that the evidence will show that there are

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1 really only five sets of facts that you need to know
2 to decide the legal issues in this case.

3 I won't review them all now. I can promise you
4 you are going to hear a great deal about these facts
5 as this trial goes on.

6 Ladies and gentlemen, it's been a pleasure
7 talking to you. It's nice to be back in my home
8 state. I look forward to presenting this evidence
9 to you as we go forward. And Mr. Woodside, who
10 represents Brown & Williamson Tobacco Company, is
11 going to address you next. Thanks.

12 THE COURT: And we are anxious to hear from
13 Mr. Woodside, but let's take just a few minutes.
14 Take a short break.

15 (A recess is taken.)

16 -- -- --

17 (In open court with a jury present.)

18 THE COURT: All right. Be seated, please.

19 All right. Mr. Woodside?

20 MR. WOODSIDE: Your Honor, may I approach the
21 bench with a copy of my boards?

22 THE COURT: Yes, sir. Do you have an extra one
23 for the court reporters.

24 MR. WOODSIDE: Yes, I certainly do.

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1 Ladies and gentlemen of the jury, Your Honor,
2 counsel: My name is Frank Woodside. I'm from
3 Cincinnati, Ohio. I represent the Brown &
4 Williamson Tobacco Corporation, which is located in
5 Louisville, Kentucky.

6 As you all probably know, it's a long time
7 manufacturer of cigarettes. Our brands include
8 Kool, Capri, Carlton, GPC and some others.

9 During the course of plaintiffs' presentation
10 and also during the course of this trial, you will
11 hear references on a number of occasions to the
12 American Tobacco Company.

13 In the 1940s, 1950s, 1960s, the American
14 Tobacco Company was a very prominent cigarette
15 manufacturer in the United States. Towards the
16 middle of the '90s, its market share dried up. In
17 1995, it was purchased by Brown & Williamson.

18 During the course of this trial -- we now make
19 their products, so it doesn't exist anymore. We are

20 just one big company. Actually, we are the third
21 largest tobacco company.
22 And collectively during the course of my
23 presentation and frequently during the course of
24 this trial, they will be referred to collectively as

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1 Brown & Williamson or sometimes we just call
2 ourselves B&W.

3 Mr. Furr has gone through the facts. I'm going
4 to talk primarily about No. 3, which is the
5 plaintiffs' medical-monitoring program is not
6 recommended by medical or public health
7 organizations because it has not been shown to be
8 safe, accurate and effective.

9 Only as I need to lead into something, will I
10 repeat what Mr. Furr said. Generally I'm going to
11 put on some details on what he said, and, quite
12 frankly, I will be much shorter. And I also have a
13 number of boards, and I will put these up, and we
14 will start going through them.

15 Now, I want to define medical monitoring for
16 you. There has been some talk about it, but I want
17 to put some details on it.

18 It's the performance of tests on groups of
19 people, not the decision an individual doctor makes
20 in regard to an individual patient, but the
21 performance of tests on groups of people without
22 symptoms.

23 Two -- three things -- find the disease early,
24 intervene or treat, and decrease mortality. Without

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1 these three things, you don't have an accepted or
2 reasonable medical monitoring program. And I will
3 discuss that during the course of our presentation
4 today.

5 As you have been told, the medical monitoring
6 program proposed by Dr. Burns and the plaintiffs
7 have not been shown to be safe accurate and
8 effective by smokers. It's not recommended by
9 governmental agencies or public health groups for
10 use in smokers.

11 You saw in Mr. Furr's chart all the
12 organizations. You saw the plaintiffs' this morning
13 showed a document saying they are adversaries and,
14 quite frequently, they are.

15 But in this case, we are adopting the position
16 they have espoused, and those organizations have not
17 recommended medical monitoring for smokers.

18 Now, in addition, smokers who want to reduce
19 the risk of lung cancer or COPD and emphysema should
20 stop smoking. Now, medical monitoring, itself, is a
21 sophisticated area of medicine and science.

22 Mr. Furr has pointed to you earlier the Guide
23 to Clinical and Preventative Services, the Second
24 Edition, and this is a report of the United States

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1 Preventative Services Task Force. The United States
2 government puts this together. There is like 950
3 some odd pages, and frankly this is my copy. I have
4 my name, Woodside, on the side.

5 The significance of this is that it's
6 complicated, it's detailed, and you need data and
7 scientific studies to determine when you should or

8 should not have monitoring.

9 Now, I'm going to try to reduce medical
10 monitoring to a couple of key points so that you
11 will understand in some better detail what we are
12 talking about.

13 Mr. Furr has explained to you it has to be
14 safe, accurate and effective. What does safe mean?
15 By the way, I'm leading into a demonstration of some
16 papers, some science that's in the literature that
17 specifically reference medical monitoring and
18 smoking so it has some real evidence.

19 It has to subject the patient to little risk.
20 Remember, these are individuals, you know, with no
21 signs, no symptoms, no disease. And when you are
22 talking about whether the patients are subjected to
23 risk, you have to talk about not only the initial
24 tests, but let's assume there is some follow-up

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1 tests, which I will talk about specifically in a
2 minute, you have to make sure that they, themselves,
3 don't create a great deal of risk for the healthy
4 patients.

5 It has to be accurate. Detect disease when
6 disease is present, does not detect disease when
7 disease is not present. Let me give you a simple
8 example.

9 We all know about pregnancies. If a woman is
10 pregnant and has a pregnancy test, she wants it to
11 say yes, I'm pregnant. If she's pregnant and it
12 says no you are not pregnant, that is a false
13 negative.

14 On the other hand, if the woman is not
15 pregnant, she has the test done and it says you are
16 not pregnant. Then it's accurate. But if she's not
17 pregnant and it says, yes, ma'am, you are, that is a
18 false positive. That's bad; right?

19 And I will talk about those in a minute. In
20 addition, it has to be effective. Now, the way I
21 would normally say this, that means it's got to
22 work. It has to lead to the proper treatment.

23 And in the world of medical monitoring, as
24 described by the U.S. Preventative Services Task

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1 Force, it has to reduce mortality. It has to save
2 lives. That's the standard.

3 That's not the tobacco company standards.
4 That's the standards set forth by scientists and
5 physicians, and it's referred to as the gold
6 standard.

7 And there will be testimony by everyone --
8 that's a gold statement, I'm sorry. There will be
9 testimony by scientists, including the experts the
10 plaintiffs bring you, that the gold standard
11 requires that you reduce mortality.

12 Now, before I get to the next one, and this is
13 going to talk about spiral CT, let me just, you
14 know, back up a little bit. This lawsuit is not
15 about people who have lung cancer. It's not about
16 people who already have COPD or emphysema.

17 The plaintiffs, they don't go to their doctors
18 for these conditions, they are not being treated for
19 these diseases, they don't have any symptoms. If
20 you have a symptom, you can't be in the class. So

21 you basically have to be healthy.
22 This lawsuit is about a group of generally
23 smokers with no symptoms who are at risk for
24 developing lung cancer or emphysema because they

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1 continue to smoke.

2 Now, just so we are clear, the tobacco
3 companies, Brown & Williamson, the rest, we
4 acknowledge, we admit smoking causes cancer, smoking
5 can cause emphysema.

6 However, in this particular situation, some of
7 the plaintiffs can have smoked for as little as five
8 years, and the testimony in this case would be
9 someone who only smoked for five back years doesn't
10 have an elevated risk.

11 There is no data showing that there is a
12 statistically significant increase in the risk of
13 lung cancer with people who have only a five pack
14 year history of smoking.

15 The data generally says you have to have 20, 25
16 years. And even then, approximately 5 to 10 percent
17 will get cancer. There is no significant increase
18 in cancer risk with individuals who have only smoked
19 five years.

20 Now, why is that particularly important? Well,
21 we say quit. That's the best medical monitoring,
22 quit. If you have only smoked five years, then your
23 risk, whatever it is, is going to go down. If you
24 smoked 20 to 25 years, it's going to go down.

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1 Now, let me point something out to you while
2 I'm on the subject. Mr. Segal gave you a copy of
3 this chart this morning which shows that the risk is
4 up here with the passage of time and then goes down
5 here in 25 years.

6 It shows you risk. It goes down not all the
7 way, but virtually to zero if you stopped at 25
8 years. You notice it goes down, it starts real
9 quick. So as soon as you stop smoking your risk
10 goes down.

11 More importantly, this type of chart, this
12 talks about individuals whose risk is high because
13 they smoked 20, 25 years. Individuals who only
14 smoked five years, they won't start way up here on
15 this chart. They would be way down over here, if
16 anywhere, because they have virtually no risk.

17 So the situation is, if you want to the reduce
18 your risk and you have only got five years of
19 smoking, stop smoking. Now, Mr. Segal said quitting
20 does not treat. That's absolutely correct, quitting
21 does not treat cancer or COPD.

22 But if you quit, your risk will go down, and
23 there will be no need to treat 20 years later. It
24 is a preventative prophylactic measure.

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1 And people can quit. There will be no claim in
2 this case that the plaintiffs can't quit. 50
3 million people have quit in the United States. The
4 current quitters outnumber the current smokers, and
5 indeed there are less smokers today than in the
6 1950s.

7 It's important to understand, however, the
8 plaintiffs' medical monitoring plan does not include

9 this logical element, quitting. But it should.
10 Now, spirometry is a breathing test which
11 Mr. Furr has talked some about. And all -- I'm just
12 going to say one or two things about it.
13 You go to the doctor and the doctor says, Do
14 you smoke? You say, yeah. The doctor says quit.
15 Well, you have got emphysema, you don't have
16 emphysema, whether you got spirometry or you don't,
17 the doctor is going to say quit.
18 The spirometry done, no matter what it says,
19 the doctor will say quit. And it don't get any
20 better. If you stop and you have COPD or emphysema,
21 it will stop progressing. You can't do anything to
22 make it go back to normal, but if you stop, it will
23 stop getting worse. And that's important.
24 So you don't need spirometry; just quit. It

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1 doesn't tell you anything. The doctor already knows
2 when you walk in, stop, quit.
3 Now, I need to talk about spiral CT. Spiral CT
4 is -- and I won't be 100 percent technical here. I
5 will be somewhat technical, but not 100 percent
6 technical.
7 Spiral CT is also called low-dose spiral CT or
8 helical CT. It's a form of imaging. It's kind of
9 like an advanced type of x-ray. And it's
10 recommended by the plaintiffs that that start at age
11 50.

12 I should tell that you the evidence will be
13 that just screening with regular chest x-rays has
14 not been shown to work. It doesn't work. So then
15 there is a question of, well, should we indeed do it
16 with spiral CT, will that work?

17 Now, the plaintiffs' proposal, Dr. Burns'
18 proposal, is based on a paper published in The
19 Lancet. The Lancet is a British Medical Journal
20 that also happens to be published each week not only
21 in Britain, but it happens to be published in Boston
22 each week.

23 In 1999 she had a paper she published. Now,
24 the paper that Dr. Henschke published -- and by the

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1 way, she is a well credentialled, well qualified
2 radiologist at the Biomedical College at Cornell
3 Medical College in New York City. And she has a
4 theory. Nothing wrong with having a theory. It
5 hasn't been demonstrated to work yet, but she has a
6 theory.

7 Now, her theory is that maybe CT scanning would
8 work. It's a published article right here. I have
9 a copy.

10 Early lung cancer action project. Overall
11 design and findings from baseline screening.

12 She looked at 1,000 individuals, she and her
13 colleagues. Their average age was 67, which would
14 be much older than they would be in this class.
15 Their average smoking history was 45 pack years,
16 much greater than someone who say only has five pack
17 years.

18 In these 1,000 thousand people, they detected
19 233 nodules in the chest. 233. That's a big
20 number. Sounds good.

21 However, of those 233, only 27 of them were

22 cancer. So she had 206, or 80 percent, were false
23 positive. That's like having a pregnancy test and
24 being falsely positive eight out of ten times. Not

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1 acceptable, ladies and gentlemen.

2 Now, in this particular case, in the paper, I
3 would like to read a little bit to you what
4 Dr. Henschke said.

5 Low-dose CT can generally improves the
6 likelihood of detection of small calcified nodules
7 and thus of lung cancer at an earlier age and
8 potentially, potentially more curable.

9 Remember, one of the things we are studying are
10 you going to decrease mortality or cure it. She
11 said would it be potentially curable; she didn't say
12 it was yesterday.

13 False positive CT results are common. In
14 addition, two other quotes from her paper. We still
15 need longer term follow-up of our baseline CT
16 detected cases of malignant disease.

17 We have not yet followed up all our
18 participants with malignant disease to determine
19 cure. She says we haven't even tried to determine
20 cure. We are trying to look at the first part only,
21 being finding disease. She doesn't get to the
22 second two.

23 Now, based upon portions I have read to you,
24 you understand that it's not been shown it's safe,

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1 accurate and effective. Let me just start at the
2 bottom for a minute because I want to expand upon
3 the safety aspect of this.

4 It's not effective because she herself says
5 they haven't even looked at cure or mortality, which
6 is the gold standard. She didn't say gold standard,
7 but that's what the evidence will be.

8 She hasn't looked at it so she's not claiming
9 it's effective. It's not accurate. I told you
10 eight out of ten are false positive and, of the 206
11 false positives, those are nodules, but there are
12 things other than lung cancer.

13 People can have lots of causes of nodules,
14 solitary pulmonary nodules, histoplasmosis, dog
15 heart worm, there is all kinds of things. But she
16 herself said false positive CT results are common.

17 When you have false positive results, that can
18 lead to unnecessary and traumatic follow-up tests.
19 And I have just listed a couple of them.

20 You could have bronchoscopy. Bronchoscopy is a
21 procedure where they stick a large tube down into
22 your lungs and look around and may take biopsies.

23 You could have different types of biopsies.

24 You could have the biopsies that are performed

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1 through a bronchoscopy. They take some tissue out
2 so they could look at it.

3 You can also have biopsies where they do what
4 is called needle biopsies; they can stick needles
5 through your chest wall, big needles through your
6 chest wall, and attempt to stick it into the nodule
7 and see if you can pull it out and get some tissue
8 and look at them under a microscope.

9 And then they will have thoracotomies.

10 Sometimes you have to do a thoracotomy. You make an
11 incision between the two ribs, open it up. You have
12 to do major chest surgery to see what it is.

13 Sometimes you have to do this, then you will
14 find out it was a false positive. And there could
15 be significant risks. Some of these procedures can
16 have risks of infection, anesthesia risks, death, et
17 cetera. So the plaintiffs' medical monitoring plan
18 is not safe, not accurate, and not effective.

19 Now, so you all can say maybe that's just me
20 saying that.

21 There is a Society of Thoracic Radiology. I
22 don't want to insult anybody's intelligence, but
23 radiology you use x-rays or other imaging
24 techniques. Thoracic meaning the chest. And there

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1 is a society for that, professional society of
2 doctors who specialize in that area.

3 And on September 22, 2000, that society
4 published a consensus statement of the Society of
5 Thoracic Radiology dealing with screening for lung
6 cancer with helical computed tomography. That's
7 helical, like spiral. That is a fancy way of saying
8 spiral CT, same thing.

9 Now, when you get to the end of this -- I
10 didn't put all of the pages up there. I just have
11 the front one to identify it and the last one
12 because it's got a summary which I want to read to
13 you.

14 Now, the summary is authored by the Committee
15 on Low-Dose CT Lung Cancer Screening of the Society
16 of Thoracic Radiology. Those people are members,
17 including Claudia Henschke, M.D, Ph.D. It's the
18 same Dr. Henschke whose articles we referred to
19 earlier who plaintiffs purport to rely on. And this
20 is what Dr. Henschke and her committee say about
21 screening.

22 Lung cancer screening with low-dose CT is
23 a complex subject. It is clear that a standard
24 of care cannot be based on currently published

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1 data. However, there are ongoing studies that
2 are generation prevalence data.

3 That means they are working on the studies, the
4 appropriate studies which address lung cancer
5 mortality and cure rates need to be performed. So
6 these studies haven't been performed yet. The data
7 analyzed and validated before the true utility of
8 this test can be determined.

9 Now here is the kicker. Thus, we do not
10 recommend mass screening for lung cancer at this
11 time but strongly encourage appropriate subjects to
12 participate in trials so that true effectiveness of
13 lung cancer screening with low-dose helical CT can
14 be determined at the earliest possible time.

15 Just we don't recommend it; studies are being
16 done; we need to see whether it does or doesn't
17 work. That's the way medicine and science work. If
18 you want to know if it is going to work, do the
19 studies and see.

20 In addition, Dr. Henschke -- I think I told
21 you, I meant to if I didn't -- her study was 1999.
22 This was September 22, 2000. Dr. Henschke herself

23 has another publication which is, I believe, July
24 1st, of this year. Yeah, July 1st, 2001.

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1 She has a study called Early Lung Cancer Action
2 Project; Initial Findings On Repeat Screening.

3 And at Page 154, she makes the following
4 comment: -- when I say "she," she is the lead
5 article; she's the one that is heading up on it.
6 She has a large number of people working on this
7 project.

8 Investigation of the interventional
9 component -- and you will recall from my original
10 slide, intervention -- that's the treatment, that's
11 the second one. She's looking at finding the
12 disease early. She hasn't gotten to the other two
13 yet.

14 Investigation of the interventional
15 component; i.e, the cure, of malignancies
16 diagnosed during screening must wait the
17 accrual of suitable numbers of carcinoma with
18 the requisite follow-up.

19 So they haven't determined it is acceptable.
20 They are still researching it.

21 Now, Mr. Segal has suggested to you, well, it's
22 really good to have earlier diagnosis because, you
23 know, you may possibly increase the survival. Well,
24 here is what the problem is.

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1 The studies to date have not supported that
2 proposition. It has not supported the proposition
3 that you save lives, that you decrease mortality.
4 One of the problems is, when you diagnose conditions
5 earlier, it doesn't mean you are going to live any
6 longer. It is just you live for a longer time that
7 you are sick. You are going to live out the same
8 amount of time. You just know earlier that you are
9 sick; that you have got a problem.

10 You know, Mr. Segal was talking about how, when
11 you can have a tumor or lesion that's the size of an
12 eraser head or pencil eraser, that tumor, that could
13 have been growing for years. It's not going to be
14 new.

15 You will hear evidence about doubling times and
16 how long things take to grow. Something that's only
17 as big as an eraser, you could have had that for
18 four or five years. You don't know it.

19 And there has been no evidence that making that
20 diagnosis earlier -- excuse me, there is no
21 scientific data showing that making that diagnosis
22 earlier is going to reduce mortality or save lives.

23 Now, Mr. Furr referred to the guide, and I
24 showed you a picture of the book. It reviewed

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1 whether medical monitoring is appropriate for lung
2 cancer.

3 It evaluated whether medical monitoring would
4 be -- do more harm than good for people who had no
5 symptoms of disease, and it did not recommend
6 medical monitoring for people just because they
7 smoke.

8 This is the United States government
9 preventative task force. This is isn't the tobacco
10 companies. It's the government saying we don't

11 recommend this. We have seen Dr. Henschke didn't
12 recommend it, and Preventative Services Task Force
13 doesn't recommend it.

14 Now, Dr. Burns is one of the plaintiffs'
15 experts in this case. And Dr. Burns submitted, as
16 all experts did in this case, a report in the case.
17 He submits a revised report of Davis M. Burns M.D.
18 I have to leave this up here for a second.

19 His report says: These tests can diagnose lung
20 cancer earlier in its course, allowing a patient
21 time to get their affairs in order and interact with
22 family. But -- this is Dr. Burns -- early diagnosis
23 has not been shown to improve long-term survival at
24 this time, and therefore major medical groups do not

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1 currently recommend screening for detection of lung
2 cancer.

3 And the major medical groups are the ones that
4 Mr. Furr showed you on the big board that I had
5 before.

6 But more important, and frankly I forgot to
7 note this when I mentioned it, his citation over
8 here is to Footnote 24. He himself, quote, Footnote
9 24, U.S. Preventative Services Task Force Guide to
10 Clinical Preventative Services, Second Edition,
11 Baltimore, Williams and Wilkins, 1996.

12 So he cites for his statement also the United
13 States Preventative Services Task Force. Now, but
14 in addition, this is what Dr. Burns says in this
15 litigation, It's not been shown to prove long-term
16 survival, and it is not recommended.

17 Now, in addition, Dr. Burns has a subsequent
18 publication. It is in a supplement to cancer. It's
19 called "Primary Prevention, Smoking and Smoking
20 Cessation." This would be a publication that
21 Dr. Burns has authored for distribution to members
22 of the medical community, not something he would or
23 would not say a lawsuit; he wouldn't direct it to
24 the lawsuit.

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1 I'm quoting Dr. Burns, the plaintiffs' expert
2 who recommends monitoring when he comes in this
3 courtroom. There is no question that the most
4 effective primary preventative strategy for lung
5 cancer in current, current cigarette smokers is to
6 quit smoking. He also says most effective, quit
7 smoking. He doesn't say monitor. He says quit
8 smoking. But he does reference monitoring. And the
9 substitution of any screening or chemopreventative
10 approach for cessation advice would be
11 irresponsible.

12 So Dr. Burns has said, if you would recommend a
13 screening program instead of a quitting program,
14 because, if people quit -- there is no question the
15 plaintiffs in this case can quit -- that would be
16 irresponsible. We agree. Why would that be
17 irresponsible? It's very easy to understand.

18 Let's assume you have a 30-year-old smoker who
19 has a five pack year history of smoking. And that
20 person is -- well, if they quit at age 30, their
21 risk by the time they are 50 would be, depending
22 upon which author or study you look at, it would be
23 virtually the same as a nonsmoker. Not quite, but

24 virtually the same. So they basically would have no
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1 risk.

2 On the other hand, if you don't quit and you
3 keep going and say it's okay, wait until -- you wait
4 to be fifty and then we will monitor you, by that
5 time, you will have a 25 pack year history, and you
6 will have a significant chance of risk of getting
7 lung cancer. So it's clearly irresponsible to
8 suggest a screening program down the road as opposed
9 to recommending quitting right now.

10 Now, in addition, Mr. Furr touched on it
11 briefly, and I don't want to go into too much detail
12 but I need to make one comment. In West Virginia,
13 the Department of Health and Human Services, Bureau
14 of Public Affairs, has these Healthy People 2000-
15 2001.

16 These are individuals in the state who are
17 charged with doing what they can to improve the
18 health of the population of West Virginia. Most
19 states have similar type of organizations.

20 In their Healthy People 2000 campaign, they
21 said, Reduce lung cancer by reducing number of
22 people who smoke. 2010, Reduce lung cancer by
23 increasing the proportion of adults who have
24 received from a physician counseling about tobacco
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1 cessation.

2 They have not recommended medical monitoring.
3 The United States government hasn't recommended
4 medical monitoring, and the U.S. Preventative
5 Services Task Force, and the State of West Virginia
6 has not recommended medical monitoring.

7 And it's important to understand that, with
8 regard to these scientific issues relating to
9 medical monitoring, this is not what the tobacco
10 companies are saying. The plaintiffs' position is
11 contrary to what the State of West Virginia, Bureau
12 of Public Health, has said as well as what other
13 outstanding public health bodies have said.

14 Now, in just a minute I'm going to turn -- I'm
15 almost finished. In just a minute, I'm going to
16 turn the podium over to Mr. Klein. He represents
17 Philip Morris and will discuss certain important
18 historical aspects of this litigation and some
19 background information.

20 Medical monitoring is clearly the central
21 issue, the central theme in this case. Plaintiffs'
22 lawyers will spend a significant amount of time in
23 the case, as they have their opening, talking about
24 the alleged conduct of the companies, various
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1 cigarette designs and various company documents.

2 With regard to many of these issues, I simply
3 ask you to judge the companies, Brown & Williamson,
4 by what they ultimately did, not what an isolated
5 individual may have said and reserve judgment on
6 these issues until you hear the rest of the story.

7 With regard to the design comments, I just want
8 to point out two or three examples of things that
9 Brown & Williamson or American Tobacco Company did.
10 If you go back to 1952, Viceroy was the first
11 cellulose acetate filter used in most brands today.

12 In 1954 Taryton was the first charcoal filter
13 and Mr. Furr said, while the plaintiffs claim we
14 weren't making admissions about whether the products
15 cause cancer or whatever, the working hypothesis are
16 there are those problems. So let's see what we can
17 do to make them safer.

18 In 1963 Carlton was the first low-tar
19 cigarette. And over the years, Brown & Williamson
20 expanded tobacco, reconstituted tobacco, put them
21 into products to reduce tar and nicotine yields.
22 The innovations continue today.

23 There is Carlton ultra. It's the lowest tar
24 and nicotine product available. It's got 0.01.

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1 Actually less than 0.01 milligram, less than 0.002
2 milligrams of nicotine. It's virtually tar and
3 nicotine free, as one of the plaintiffs experts will
4 concede.

5 We also have a product, Advance, which is
6 currently in test market which reduces what are
7 called tobacco specific nitrosamines, which are
8 thought to play a role in cancer. As Mr. Furr said,
9 we can't guarantee these products are safer, but the
10 companies continue to do research on them and
11 continue to work on them.

12 I feel compelled to make one comment on
13 research because of something Mr. Segal said this
14 morning. He talked about one of our facilities
15 shutting down or whatever, our BATCO facility.

16 For fifty or more years the company has done
17 various types of research, the type of research
18 Mr. Furr talked about at R. J. Reynolds as well as
19 biological research.

20 The BATCO, they continue to research today.
21 Their facilities have not been shut down. In
22 addition, if you go back to 1936, the American
23 Tobacco Company funded certain biologic research at
24 the Medical College of Virginia.

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1 And that continued on for years. The results
2 of this, you can't see it, I will pull some over for
3 you, but there is a book with three large
4 supplements which originally was published like in
5 1961, Tobacco, Experimental and Clinical Studies, a
6 comprehensive account of the world literature by
7 professors Larson, Haag & Silvette at the Medical
8 College of Virginia.

9 In there you can find the results of work -- as
10 well as with the supplements, and I have a couple of
11 them here just to show you how large they are -- you
12 can find the results of work which the company
13 funded.

14 And there were over 200 scientific publications
15 in peer-reviewed journals from '36 to '94 on eight
16 different years. Starting in 1950, Medical College
17 of Virginia had reviews of biologic research, and I
18 pointed out to you the Larson, Haag & Silvette
19 publication.

20 And more importantly, this is information that
21 was out there. The significance of the work we did
22 and the fact it was published is recognized in the
23 Surgeon General's report.

24 There has been discussion from Mr. Segal about

1 the Surgeon General's report, and I know, if you
2 look at Page 14, the annotated monograph by Larson
3 Haag & Silvette compiled from more than 6,000
4 articles published in some twelve hundred journals
5 up to 1959 was available as a basic reference
6 source.

7 So the Surgeon General thought that the work we
8 were doing was significant and important.

9 I'm going to turn this back to Mr. Klein, now,
10 over to Mr. Klein. But before I do, I want to make
11 something abundantly clear. This case is about
12 medical monitoring.

13 The plaintiffs' plan does not fulfill the basic
14 requirements of a medical monitoring program because
15 it does not address the intervention issue and has
16 not been shown to decrease mortality. It's not been
17 shown to be safe, accurate and effective

18 And in particular I have explained to you about
19 all the false positives and the potential for
20 problems as a result of sophisticated, complicated
21 follow-up procedures.

22 It's not recommended by governmental agencies
23 or public health groups and, smokers who want to
24 reduce the risk of lung cancer and COPD should quit

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1 smoking.

2 And I'm sure we will talk about again, one of
3 the Surgeon General's warnings. Mr. Segal showed
4 you four different packages and four different
5 Surgeon General's warnings.

6 I don't think he read you to what they all
7 were. Quitting smoking now greatly reduces serious
8 risks to your health. And that's what the
9 government recommends, and that's what various
10 public health groups recommend, and that is the best
11 form of medical monitoring we could have.

12 Ladies and gentlemen, I thank you for your
13 time, and I will now turn this over to Mr. Klein,
14 who represents Philip Morris. Thank you very much.

15 THE COURT: All right. Mr. Klein?

16 MR. KLEIN: Your Honor, I will just need a
17 minute or two to...

18 THE COURT: All right.

19 MR. KLEIN: Good afternoon, ladies and
20 gentlemen. Sorry for the delay. My name is Sam
21 Klein. I represent Philip Morris. As Mr. Segal
22 told you this morning, we manufacture Marlboro and a
23 bunch of other cigarettes.

24 The hour is late, you sat painfully through a

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1 lot of lawyers talking. You have got a couple more
2 to go, so I'm going to get right to it. I'm going
3 to spend my time talking to you today principally
4 about two areas.

5 One, the response of these companies to the
6 evidence linking smoking and disease in the early
7 1950s. I'm going to talk to you about the Frank
8 Statement you heard much about and Council for
9 Tobacco Research.

10 I'm also going to spend some time trying to
11 respond to some of the allegations of misconduct
12 which were made here this morning. I can't respond

13 to all of them in the short time that I have today.
14 You heard a lot of snippets from documents. I can't
15 respond to them all.

16 I ask only that you keep an open mind until you
17 get a full context of the document and the story
18 behind the document. And I'm going to give you some
19 examples about that as we go along.

20 Now, ladies and gentlemen, the story we are
21 about to undertake together during the next several
22 weeks is a story which spans fifty years when the
23 original mouse skin paintings -- you will hear a lot
24 about the mouse skin painters -- from Ernst Wynder

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1 that were first published in the early 1950s,

2 The president of the United States was Harry S.
3 Truman. And when the Frank Statement was published,
4 the president was general Dwight David Eisenhower.
5 And as all of us know, either from having lived
6 through it or from reading your American history
7 books, America was a much, much different place back
8 then.

9 The front page stories in the newspapers dealt
10 with President Eisenhower meeting with Winston
11 Churchill, prime minister of England, about the atom
12 bomb. The Wheeling News Register cost five cents.
13 The biggest sports story of the day was when West
14 Virginia University went to the Sugar Bowl.
15 Tickets cost \$8. They lost.

16 Color television just introduced, laptop
17 computers, more than technology, only a dream in the
18 eyes of most sophisticated scientists, unimaginable
19 to the rest of us. So when you hear the evidence
20 that comes into this case, I ask you to put it into
21 context what was known and not known at the time.

22 You heard about the Frank Statement. I'm going
23 to talk to you about the Frank Statement. In the
24 early 1950s, the dangers of cigarette smoke -- and

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1 you are going to hear from Mr. Newbold next -- were
2 well known to America for decades and decades.

3 But in the early '50s, the first scientific
4 studies, these were the mouse skin paintings or
5 epidemiological studies, which were the first
6 scientific studies to link smoking to disease.

7 The executives of these companies were
8 obviously concerned about that. They got together,
9 and they tried to decide what to do about it. What
10 they decided to do was to try and fund, as well as
11 research in-house, independent research through a
12 group called the Council for Tobacco Research or
13 Tobacco Industry Research Committee as it was first
14 known,

15 And to announce the formation of that committee
16 and the decision by these companies to fund
17 independent research, they took out an advertisement
18 in newspapers around the United States, one time,
19 called the Frank Statement, which you heard about
20 this morning.

21 And I'm going to put that up for you. Now, I
22 can't obviously go through the entirety of this
23 statement, although I would love to, in the time
24 that I have, so I'm going to focus on some of the

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1 sections that the plaintiffs have gone into this
2 morning.

3 The first the statement says, There is no proof
4 that cigarette smoking is one of the causes of
5 disease. Remember, this was 1954. They do give
6 reference to the mouse skin paintings, and they say
7 there was no proof.

8 And the evidence will be, ladies and gentlemen,
9 that was absolutely true in 1954, and that's exactly
10 what prominent scientists of the day were saying.

11 Indeed, Dr. Ernst Wynder himself, the man who
12 did these mouse skin paintings -- and what he did
13 was grow mice specially grown to be susceptible
14 disease, shave the backs, put massive amounts of tar
15 on it, and showed those mice grew tumors.

16 Dr. Wynder himself said that the mouse skin
17 paintings, the mouse skin test, doesn't give
18 definitive proof of human carcinogens.

19 American Cancer Society, taken alone, they
20 don't prove a thing. So when -- the National Cancer
21 Institute said the same thing.

22 So when these companies said in 1954 that there
23 was no proof, that was absolutely true. And you
24 jump down a little bit, and you say we believe the

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1 products we make are not injurious to health. There
2 is no proof.

3 Would we say that today? Of course not.
4 Science has grown a great bit since 1954. And what
5 do we say today? Let me show you what at least my
6 client --

7 MR. SEGAL: Before you put that up, I have an
8 objection, Your Honor. I would like to approach.

9 (At sidebar:)

10 MR. RODES: This is the board they are about to
11 put up. They are on No. 5.

12 Your Honor, we submit that's the choice issue,
13 plain and simple.

14 MR. KLEIN: It's not choice, Your Honor.
15 That's our company telling -- that's a position we
16 have taken. We have withdrawn from the debate. We
17 won't take a position on these matters. We are
18 simply saying smokers are to take advice from the
19 public health authorities, period. I am not going
20 to talk about choice. That's all we are saying.

21 MR. FURR: It's conduct.

22 MR. KLEIN: It goes to the conduct of these
23 companies. Mr. Segal went on and addressed our
24 conduct over fifty years, and we are trying to tell

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1 the public what the conduct is. It started during
2 the period.

3 MR. RODES: Decision is choice. They are
4 talking about taking this information and making
5 these decisions whether to smoke.

6 THE COURT: All right. Could it? Possibly. I
7 think it's an appropriate response in the opening
8 statement to what was brought out in the plaintiffs'
9 opening. And we will see how it goes.

10 I mean, we are not going to allow evidence to
11 come in on choice. To the extent it is limited
12 basically to the position of the tobacco companies
13 saying, listen, this is what the public health

14 authorities are basically saying, how can we do
15 anything wrong if this is what we are saying -- I
16 mean, at some point whether they can accept that or
17 not is another story.

18 MR. RODES: In view of the representation at
19 this time it goes on to talk about their conduct, we
20 would be asking for a curative instruction akin to
21 the one that was given in the last go around
22 limiting that evidence to that context.

23 THE COURT: You present it to me, and I will be
24 happy to give it. When do you want me to give it?

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1 MR. RODES: At the end of their opening
2 statements would be appropriate.

3 THE COURT: How about writing one out and let
4 me look at it.

5 MR. RODES: I have just excerpted one from what
6 you gave last time, and we will be provided to give
7 it to you.

8 THE COURT: Do you have it?

9 MR. RODES: Should we bring it up now or wait
10 until he finishes?

11 THE COURT: Wait until he finishes. Are you
12 ready to go?

13 MR. KLEIN: I'm ready to go.

14 THE COURT: All right.

15 (In open court:)

16 THE COURT: All right, Mr. Klein, do you want
17 to continue?

18 MR. KLEIN: Yes, Your Honor, thank you.

19 What do we say today? This is -- you heard
20 about web sites. This is coming out of the Philip
21 Morris' web site. The other companies say
22 essentially the same thing, sometimes in different
23 words

24 We agree with the overwhelming medical and

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1 scientific consensus that smoking causes lung
2 cancer, heart disease, emphysema, and other serious
3 diseases in smokers. Smokers are far more likely to
4 develop serious diseases like lung cancer than
5 nonsmokers.

6 There is no safe cigarette. We agree with the
7 overwhelming medical and scientific consensus that
8 cigarette smoking is addictive. These are the
9 messages of the public health authorities. Smokers
10 and potential smokers should rely on these messages
11 in making all smoking related decisions.

12 That's the position of these companies today.

13 Next in the Frank Statement is a statement of
14 course that we accept an interest in people's health
15 as a basic responsibility paramount to every other
16 consideration in our business.

17 Again, a statement made in 1954. Now, you have
18 heard from Mr. Furr some of the things that these
19 companies have done in terms of design and trying to
20 reduce tar and nicotine, and you are going to hear
21 an enormous amount of evidence throughout the course
22 of this trial of what these companies have done in
23 the interest of people's health in trying to design
24 as safe a cigarette as they can. From the fields

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1 where it's grown, to try to genetically engineer how

2 it's grown, to how it's cured in barns -- in heated
3 barns, air dried tobacco.
4 You will hear about different kinds of tobacco,
5 reconstituted tobacco, expanded tobacco. Those
6 things won't mean anything to you right now, but you
7 will hear about all the efforts these companies have
8 made to paper design, filter design, a myriad of
9 different techniques that have gone on over the
10 years.

11 You will hear about something called specific
12 reduction, where they went in and specifically tried
13 to reduce identified carcinogens in tobacco, to try
14 to get them out, spent fortunes trying to do it

15 Unfortunately, by and large, they were unable
16 to do that because cigarette design is incredibly
17 complex. And what you will hear from the
18 plaintiffs' own witnesses is, once you reduce one
19 compound, the likelihood is you will increase
20 another compound which is equally as bad, if not
21 worse.

22 You will hear about those specific reduction
23 techniques, you will hear about what we call general
24 reduction, which was the effort to try to bring down

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1 tar and nicotine.

2 And the bottom line here, I think, was said by
3 Mr. Furr. The state of the art of cigarette design
4 in the world is not from the Japanese or from the
5 Europeans or from the other Asian companies, many of
6 whom have companies that are owned by governments.

7 The state of the art in cigarette design are by
8 these American companies, the defendants in this
9 case. They set the state of the art. Virtually
10 every design and advance in significant design the
11 world over has come from these companies.

12 Next, we always have and always will cooperate
13 closely with those whose job it is to safeguard the
14 public health. I'm going to talk to you about
15 cooperation in a little bit because cooperation,
16 ladies and gentlemen, you will hear is a two-way
17 street.

18 Mr. Furr mentioned to you something called the
19 Tobacco Working Group, the TWG. Back in 1968, under
20 the auspices of the National Cancer Institute, they
21 wanted to form a group dedicated to trying to find a
22 less hazardous cigarette, and that was the TWG.

23 And they brought together renowned scientists
24 from universities around the country, research

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1 facilities, hospitals, government, public health
2 groups, scientists from these tobacco companies.

3 The initial working group included Dr. Ernst
4 Wynder himself of the mouse skin paintings, former
5 Surgeon General Jessie Steinfield. For ten years,
6 that group worked trying to make a less hazardous
7 cigarette.

8 You will hear every idea generated by that
9 group during a ten-year period had already been
10 identified and implemented by these tobacco
11 companies.

12 Nonetheless, they continued to work on trying
13 to solve this very complex problem, and in 1978
14 there was a significant change. The president of

15 the United States at that time was Jimmy Carter.

16 And president Carter appointed a man, an
17 attorney, a lawyer by the name of Joseph Califano,
18 to be Secretary of Health, Education and Welfare.
19 Secretary Califano had a different idea.

20 He no longer wanted to work with these
21 companies to make a safer cigarette. What he wanted
22 to do was to end smoking, irradiate smoking in the
23 United States by the year 2000.

24 And you may have heard of his slogan, Smoke

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1 Free America 2000. And these companies have no
2 complaint about that decision. It was a perfectly
3 appropriate and proper decision for a governmental
4 official to make.

5 But in implementing that decision, he declared
6 war on tobacco, called it Public Enemy No. 1, shut
7 the TWG down. Research stopped; inhalation studies
8 stopped in midstream.

9 It led to a war of words, lack of trust,
10 politicized the debate. There was a lot of blame to
11 go around, frankly, on both sides of the equation,
12 you will hear.

13 But it's unfair to say that these companies
14 didn't cooperate or breached their statement that
15 they would cooperate under those kinds of
16 circumstances because cooperation is a two-way
17 street

18 And you are going to hear about lots of other
19 cooperation, cooperation which predated the Surgeon
20 General's report in 1964 and cooperation with
21 various public health groups which continues as we
22 speak today. Some of the scientists will be here
23 and talk to you about how they are cooperating today
24 with public health groups.

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1 Let me go back to the Frank Statement, if I
2 could. Right at the end, they tell the American --
3 the readers of the advertisement what they intend to
4 do. Many people have asked us what we are doing to
5 meet the public's concern aroused by the recent
6 reports. Here is the answer.

7 This is what the Frank Statement is telling the
8 public it's going to do.

9 We are pledging aid and assistance to the
10 research effort into all facets of tobacco use
11 and health. This financial aid will of course
12 be in addition to what is already being
13 contributed by the individual companies. For
14 this purpose, we are establishing a joint
15 industry group which will be known as the
16 Tobacco Industry Research Committee, TRIC,
17 ultimately changed to the Council for Tobacco
18 Research, CTR.

19 Did they do that? Yes, they did. The TIRC,
20 Tobacco Industry Research Committee -- we generally
21 refer it to as CTR because it's shorter. The CTR
22 was formed.

23 What was CTR? It was not a group that did
24 research on its own. It didn't have its own

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1 laboratories and conduct experiments. It was a
2 group that received funding from these tobacco

3 companies and went out and awarded -- received
4 research proposals from scientists around the United
5 States and made decisions to award grants or
6 funding, to fund certain projects.

7 And it was run through sort of a board of
8 directors, if you will, called the Scientific
9 Advisory Board. They are the ones that made the
10 funding decisions for the Council for Tobacco
11 Research.

12 And who were those folks? Were these folks
13 aligned with the tobacco company?

14 Well, you will see that evidence will be that
15 the scientific advisory board made the funding
16 decisions, and these were folks from the finest
17 research institutions around the United States.

18 They are the ones that made the funding
19 decisions, and they were not tied to the tobacco
20 companies. And the idea actually of setting up the
21 CTR with the Scientific Advisory Board, an
22 independent group, to make the funding decisions,
23 came from Dr. Ernst Wynder, the man that did the
24 mouse skin paintings. And you will see his letter

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1 in which he suggests that this is the way the
2 research ought to be conducted.

3 And who were the researchers that did the
4 research work for -- that received these kinds of
5 grants?

6 Well, what you will see is that they were
7 researchers, independent researchers, not affiliated
8 with the tobacco companies, from the finest
9 universities and research facilities in the United
10 States, from east to west and everywhere in
11 between.

12 Five of the researchers that did CTR research
13 ultimately went on and won Nobel prizes for their
14 research, indicating they are the kind of quality
15 scientists which were funded by CTR.

16 Now, let me go back for just one moment to the
17 Frank Statement because, at the very end, they say,
18 In charge of the research activities of the
19 committee will be a scientist of unimpeachable
20 integrity and highest repute.

21 Did they honor that, was there such a man? Let
22 me show you who the scientific directors were.

23 The first scientific director who served for
24 about sixteen years was a gentleman named Clarence

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1 Cook Little. Dr. Little was no tool to the tobacco
2 company.

3 He was the president of the University of
4 Michigan, president of the University of Maine,
5 president of a group that was the predecessor of the
6 American Cancer Society. He was the founder of the
7 Jackson Memorial research facility in Bar Harbor,
8 Maine, which was the leading cancer research
9 institute of its day.

10 After a year or two, he was followed by William
11 Gardner, who was the Chair of the Department of
12 Medicine at Yale Medical School. These were
13 independent people that made these kinds of funding
14 decisions and carried out the research.

15 And what did the research say about smoking and

16 health? Did they ignore smoking and health? Did
17 they try and hide it? Let's take a look.
18 You will see lots and lots of these articles
19 presented to you during the course of the trial. I
20 just picked a couple of them.
21 1965, significant increase in birth weights of
22 infants due to mothers who smoke was found.
23 Remember the warning on the package about low
24 birthweight. It came from CTR sponsored research.

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1 Smoking of cancer and women in 1968, you will
2 hear the 1964 Surgeon General's report found that
3 cigarette smoking caused lung cancer in men, not
4 women. CTR sponsored research took that a step
5 further.
6 Emphysema, in 1979, very famous studies by
7 Professor Janoff that ultimately led to the
8 conclusion that cigarette smoking did cause
9 emphysema.
10 So this research which made significant
11 contribution to the scientific body of knowledge
12 about smoking and disease and did not minimize the
13 impact of smoking.
14 The quality of the research? The Surgeon
15 General cited CTR sponsored research projects more
16 than 600 times. It was a chart given to you this
17 morning says that was only 10 percent of all the CTR
18 research projects.
19 But folks, research is just that; it's
20 research. Not all of it works; not all of it is
21 significant; not all of it meets its purpose. But
22 600 times, the Surgeon General, who was writing
23 about smoking and disease, found that CTR sponsored
24 research was right on the mark about the

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1 relationship between smoking and disease.
2 And this research also appeared in the New
3 England Journal of Medicine, American Medical
4 Association journal and many other prominent
5 publications.
6 You heard this morning, as well, that some of
7 the research scientists inside of these companies
8 didn't like the CTR. One memo that was shown to you
9 was something called "subjects to be avoided."
10 Well, when you set the whole matter in context,
11 and you will see that document in context, it was
12 written 26 years or 24 years after CTR was formed.
13 And it said, one of the things, we don't want to
14 pursue any further research on new tests for
15 carcinogenicity.
16 Well, what happened? Did they adhere to that?
17 Was that a subject which was avoided? You will hear
18 that CTR sponsored research after that memo, the
19 subjects to be avoided, went on and on, study after
20 study after study, including studies by Nobel Prize
21 winners on new tests for carcinogenicity.
22 This was good, quality research.
23 Mr. Segal also gave you a chart which compared
24 the CTR expenditures to the advertising of these

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1 companies. Let me respond to that. First, he only
2 compared the advertising dollars to the CTR
3 research. And that ignored the billions, billions

4 of dollars, spent by these companies individually in
5 trying to make a safer cigarette. And you are going
6 to hear a lot about that during the course of this
7 trial.

8 Perhaps even more importantly, you are going to
9 hear evidence in this trial that there is only so
10 much money you can spend on science at any one given
11 time.

12 It is a sad but true fact that we cannot buy a
13 scientific breakthrough. Cigarette design, as I
14 told you, it looks simple, a bunch of tobacco,
15 wrapped in paper, just stick a filter on the end, it
16 looks simple.

17 It is incredibly complex, and you will hear
18 about the complexity of cigarette design. You could
19 have spent all the money you wanted to spend back in
20 1954, the time of the Frank Statement, trying to
21 take the huge computers of the day and make them
22 into a laptop computer, and you wouldn't have gotten
23 there because the scientific building blocks had not
24 yet grown.

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1 Money is not why we haven't solved cancer or
2 AIDSZ aids or Alzheimer's, because some scientific
3 problems are so tough, including cigarette design,
4 that throwing money at them just is not the answer.

5 You can spend whatever you want to spend on
6 advertising, but, when you compare advertising and
7 scientific research, you are comparing apples and
8 oranges.

9 Now, I would like to devote the rest of my time
10 talking to you, if I can, in trying to respond to
11 some of the allegations of misconduct which have
12 been made against these companies.

13 I can't respond to them all. That's why I went
14 through the CTR in some detail with you. It's sort
15 of like a bull running through a china shop.

16 It takes a minute or two for a bull to run
17 through a china shop, knocking dishes all over the
18 place and shattering them on the floor, leaving
19 others sort of teetering on the edge.

20 It takes a painfully long time to put things
21 back together, piece them together into their proper
22 context so you have got the whole story. I just
23 don't have the time to piece all of that together
24 with you this afternoon.

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1 But I'm going to respond to a couple of things.

2 You heard about something called a gentlemen's
3 agreement. What you are going to hear about that is
4 more myth than reality, and it's vague. Some people
5 are going to tell you there was an agreement not to
6 do biological research. Others are going to say it
7 was an agreement not to do biological research in
8 the United States. Others are going to say it was
9 an agreement not to make a safer cigarette.

10 And that's because none of the witnesses that
11 are going to be here or have testified for years at
12 depositions in these tobacco cases was a participant
13 to it.

14 They are reading snippets of some documents
15 that refer to a gentlemen's agreement. And when you
16 are done, I think you are going to have two

17 conclusive facts.

18 First, whatever this thing called the
19 gentlemen's agreement was, the evidence will be
20 clear everybody violated it, nobody paid any
21 attention to it. The documents make that clear.

22 Second, a research scientists will be here,
23 folks who have worked for these companies for years
24 and years and years, and they are going to tell you

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1 the agreement not to do biological research, we did
2 biological research in the United States, we did
3 biological research in Europe, we did biological
4 research all the time. The agreement not to make a
5 safer cigarette, we spent our whole lives trying to
6 make a safer cigarette. Up until today, the
7 research continues.

8 Cigarettes are inherently dangerous. Mr. Furr
9 told you about some of the new products which are on
10 the market. Let me talk you to something called the
11 Accord. We don't know if it's safe. We think it is
12 safe. It might be; it might be a step in the right
13 direction.

14 This is a process which tries to avoid the
15 problem which is caused by burning of tobacco. When
16 you burn tobacco and you smoke it, it burns at an
17 incredibly high temperature, about 2,000 degrees.

18 And the thought has been, if you can lower the
19 temperature and not burn it, but rather just heat
20 it, that you are going to dramatically reduce the
21 biological activity of the smoke.

22 But how do you do that? There is some products
23 that Mr. Furr's client, R. J. Reynolds, which
24 attempts to do that. Philip Morris has spent

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1 hundreds and hundreds of millions of dollars trying
2 to solve the problem of how do you heat tobacco

3 They have come up with this product called
4 Accord. It performs wonderfully in biological test
5 showing a dramatic reduction. Is it safe? No. Is
6 it a step in the right direction? Absolutely.

7 And how it works is actually through a battery
8 operated device, you take the cigarette, you insert
9 it into the hole here, nothing happens until you
10 draw on it. The second you draw on the cigarette,
11 it heats the tobacco and you get a puff of tobacco.

12 Will consumers find it acceptable? It's in
13 test markets. We don't know. It hasn't stopped us
14 from trying. Huge amounts of money on products like
15 this which continue to this day.

16 You also heard some evidence that we suppressed
17 somehow research. Let me talk to you about that.

18 Cigarettes are perhaps the most studied
19 consumer product in the history of the world.
20 Research into cigarette and cigarette design and
21 efforts to make a safer cigarette went on not only
22 at these tobacco companies, but by scientists around
23 the world.

24 You are going to see that in 1964, there were

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1 7,000 articles on smoking and health. By 1989,
2 which is the last statistic I have, 57,000 documents
3 about smoking and health were on file with the
4 Office of Smoking and Health.

5 Those researchers and those documents and those
6 57,000 documents tried to find ways to make a less
7 hazardous cigarette, and you won't hear anything in
8 those documents which these companies haven't
9 implemented or identified and tried to implement
10 which makes a cigarette safer.

11 And all of our documents, the internal
12 documents, they have all been made publicly
13 available. They are all on the internet. There are
14 there for scientists around the world to see,

15 There is no certainly in any of those documents
16 that somebody has identified that we knew how to
17 make a safer cigarette and hid it or suppressed it.

18 Indeed, their expert will come in here and tell
19 you, as early as 1980, he thought Philip Morris had
20 the right cigarette, a safe cigarette. Of course,
21 nobody would smoke it because you needed
22 instructions on how to light it, but it was a safe
23 cigarette.

24 So I ask you put things in context when you

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1 hear about suppression of research, and I want to
2 give you an example.

3 Mr. Segal showed you a document this morning, I
4 don't have his big chart. You may remember one of
5 these, what a cigarette is in the tobacco industry's
6 own words

7 And I highlighted the middle because that was a
8 Philip Morris document. Cigarette should be
9 conceived not as a product, but a package. The
10 product is product. Think of a cigarette as a
11 storage container for a day's supply of nicotine.
12 Think of a cigarette as a dispenser for nicotine.

13 I don't want you left with the impression that
14 reading or hearing statements like that, that that
15 was some secret buried in the files of the tobacco
16 companies.

17 The evidence will be, when you see the document
18 and you hear about the document, that cigarettes
19 have been referred to as nicotine delivery devices,
20 not just by tobacco companies scientists, but by
21 scientists around the world.

22 Since 1942, that term was in use by research
23 scientists, not some secret of the tobacco
24 companies.

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1 And this document that was referred to, it
2 wasn't a secret. It was a speech, it was a speech
3 given by a tobacco company scientist over and over
4 and over again to groups around the United States,
5 not just the tobacco people.

6 So when you see some of these documents, ladies
7 and gentlemen, I ask you keep an open mind and try
8 to keep them in context.

9 Now, as I said, Philip Morris and these other
10 companies are indeed very proud of the research that
11 they have done in their efforts to try and make a
12 safer cigarette.

13 But standing here looking at you, looking back
14 over 50 years, I can't tell you that we are proud of
15 everything that has gone on over that 50-year
16 period.

17 Throughout this period, cigarettes were a

18 controversial product, as you well know. During
19 this period, these companies employed thousands and
20 thousands of employees who generated millions and
21 millions of documents.

22 Some of these documents reflect the very good
23 things these companies did in trying to reduce tar
24 and nicotine to come up with better and safer

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1 cigarette designs.

2 Some of the documents, if you look back at them
3 today, seem just silly. Some of the documents
4 express ideas which are just wrong. And some of the
5 documents express ideas which are bad, which are
6 just dumb.

7 And there are some examples. You saw this
8 morning some document about folks wanting to have a
9 dummy mailing address or perhaps destroy documents.
10 As I said, some individuals in these companies had
11 some dumb ideas.

12 The evidence you will hear -- that's why I ask
13 you to keep an open mind -- you will hear from
14 scientists that will come in here to tell you how
15 research papers are kept and maintained at these
16 companies,

17 You will hear about the biological research
18 which was done at this company called INBIFO over in
19 Germany. It was a company that Philip Morris first
20 contracted with them, it purchased to do its
21 biological research.

22 You will hear about the meticulous German
23 record keeping, how every page of every notebook is
24 numbered, and what anybody ever did in the United

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1 States, those documents remained in INBIFO's files,
2 and they are on the internet today. There is no
3 kernel of anything that we do that the world doesn't
4 know.

5 And in 1954, ladies and gentlemen, when the
6 Frank Statement was published, there was a
7 legitimate debate about smoking and health.
8 Dr. Wynder said there was no proof.

9 And as time went on in 1964, you heard about
10 the Surgeon General's report. Ten years later, even
11 ten years later the, Surgeon General, when he came
12 to the conclusion that smoking caused lung cancer in
13 men, had a huge debate within the committee which
14 was studying this about the definition of the word
15 "cause," what does it mean to say one thing is
16 caused by another in a scientific sense.

17 It was a term which was discussed vigorously,
18 and no one used the word "cause" in an absolute
19 sense in that study.

20 And after 1964, these companies continued to
21 debate whether or not cigarettes caused disease,
22 whether the mechanism of disease had been proven.

23 We pointed out the limitations and
24 epidemiological studies, we pointed out causation

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1 couldn't be established without knowing what in
2 smoke caused lung cancer, how the mechanism worked,
3 which was the traditional way in which scientific
4 cause was established.

5 You heard this morning about the Auerbach

6 Beagle dog studies. Well, criticize them we did,
7 because Dr. Auerbach, you will hear -- there is
8 another side to that story -- good researcher, fine
9 physician, but this particular research was flawed.

10 It was so flawed that peer reviewed publication
11 after peer reviewed publication refused to accept it
12 and refused to publish it. You will hear that the
13 National Cancer Society criticized it; that the
14 Surgeon General of the United States ten years later
15 criticized it.

16 Nonetheless we continued to argue about
17 mechanism and the technical definition of cause,
18 legitimate arguments in the 1950s, 1960s. As late
19 as 1969, perhaps, there was an editorial in the
20 Journal of the American Medical Association called
21 The Great Debate That's Still Going On.

22 But we continued the debate after the
23 scientific and medical community had come to a
24 consensus that smoking caused disease, however you

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1 defined cause, and long after the American public
2 had come to fully accept the conclusions of the
3 Surgeon General.

4 And these companies fell out of step. What are
5 they doing today? I told you a little about that
6 earlier.

7 But today these companies voluntarily have
8 withdrawn from the public debate. We will no longer
9 argue about causation in public. We agree that
10 there is an overwhelming scientific and medical
11 consensus that smoking causes disease in smokers.
12 And we recognize that, in retrospect, we continued
13 the debate too long.

14 But when you get done hearing all of the
15 evidence in this case, I think you are going to come
16 away essentially with three conclusions.

17 One, although we continued to debate too long,
18 and some individuals in these companies had some
19 wrong-headed ideas, we never wavered in our efforts
20 to make the safest cigarette possible; and that
21 these companies' efforts have produced the state of
22 the art worldwide in cigarette design.

23 Second, although we continued the debate too
24 long, and some individuals in these companies had

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1 some wrong-headed ideas, as you look at Mr. Furr's
2 chart, there is no claim in this case that any class
3 members were misled or that anybody underappreciated
4 the risks of smoking.

5 And I have gone through some of the history
6 with you really because the plaintiffs did, but
7 there is no claim in this case that anything we did
8 over the course of fifty years caused people to
9 smoke when they continued to smoke.

10 And over that fifty year period when our
11 conduct is being questioned, the smoking rates in
12 this country have dramatically declined throughout
13 the period of fifty years of which our conduct is at
14 issue.

15 And third, ladies and gentlemen, although we
16 continued the debate too long and had some wrong-
17 headed ideas, we now say look to the public health
18 authorities and to the consensus of medical and

19 scientific information about smoking.
20 And we ask that, when you are considering
21 medical monitoring, that you do the very same
22 thing. Look to the medical and scientific
23 consensus, which clearly tells you that medical
24 monitoring is not reasonably necessary just because

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1 you smoke.

2 There is a way to reduce risk, and it's not to
3 be medically monitored. It's to quit, as the
4 Surgeon General says on each and every pack. Thank
5 you for your attention. I appreciate it. I know
6 the hour is late.

7 Mr. Newbold will be up next to talk to you
8 about number two, smokers have long known the risks
9 of smoking. Thank you.

10 THE COURT: Do you want time to get set up?

11 MR. NEWBOLD: Yes, Your Honor. I would
12 appreciate it.

13 THE COURT: Why don't we take -- stand up or
14 stretch or something. You don't have to, but if you
15 want to, you can.

16 (Pause)

17 THE COURT: Okay. Are we ready? Mr. Newbold.

18 MR. NEWBOLD: May I approach the bench and give
19 Your Honor a copy?

20 THE COURT: Yes.

21 MR. NEWBOLD: The bad news is it's quarter
22 after four. The good news is I'm the last lawyer
23 you are going to have to listen to today except for
24 His Honor, who of course is going to dismiss you.

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1 Good afternoon, my name is Bill Newbold, and
2 I'm an attorney, and I represent the Lorillard
3 Tobacco Company.

4 Counsel, and my fellow counsel, I'm here today
5 to talk about something. And since it's late, I'm
6 going to try to make it as interesting as I can. I
7 will try to move it along as quickly as I can.

8 But I'm here to talk about number two, smokers
9 have long known the risks of smoking, and plaintiffs
10 do not claim that class members were misled or
11 underappreciated the risks of smoking.

12 In other words, everyone in this class knew
13 that smoking was bad for them, and no one was misled
14 about that topic.

15 Now, you heard today about a lot of doctors
16 that you are going to hear from. You heard you are
17 going to hear from a Dr. Gaziano, you are going to
18 hear from a Dr. Burns.

19 You know, there's another doctor, and you
20 brought him with you today, and he's sitting right
21 next you to. That's Dr. Common Sense. No one tells
22 you to leave your common sense behind when you come
23 and sit as a juror.

24 Your common sense tells you and you know that

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1 everyone has known that smoking is bad for you, and
2 they have known that for a long time. What I'm
3 going to do today is try to outline what the
4 evidence is going to be why is it that everybody has
5 known for so long that smoking is bad for you? I'm
6 going to try to break it down.

7 First I'm going to break it down as to what
8 everybody knew in the United States, and then what
9 everybody knew in West Virginia, and then we are
10 going to look at some polling data.

11 The first, why is it, why did everybody know
12 that smoking is bad for you. How do you get common
13 knowledge? How do you know the things that you just
14 know?

15 Well, you get them in a lot of ways. You get
16 them from newspapers and magazines, books, doctors,
17 movies, songs, your federal government, your state
18 government, your unions, your church, your other
19 organizations, your family, your friends and, in the
20 case of cigarettes, from the Surgeon General of the
21 United States himself.

22 That's how you get information. You learn
23 things, you talk about it, you hear, you read about
24 it, smoking is bad for you. It becomes engrained in

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1 you. It becomes second nature. You know it.

2 You know, I heard Judge Recht in another case
3 once say most people don't want to be on a jury
4 because they think it's terrible, but then, after
5 they serve, they say, you know, that was really
6 pretty neat; I really learned some things.

7 And that is what's neat about being a trial
8 lawyer and about being a juror, because you learn
9 very interesting things. And I learned, I think,
10 one of the most interesting things about cigarettes
11 and how long people have known that they are bad for
12 you.

13 You know what I learned? Now we are all going
14 to learn. That in 1604, four hundred years ago,
15 King James, who was the king of England, who was the
16 one who authorized the King James version of the
17 Bible, King James version of the Bible, the biggest
18 selling book ever, King James hated tobacco.

19 It had just been brought into England by
20 Columbus. And here is what he said about it, how
21 bad it was. He wrote this counterblast he called
22 it, to all the people of England.

23 Tobacco is a custom loathsome to the eye,
24 hateful to the nose, harmful to the brain,

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1 dangerous to the lungs, and in the black
2 stinging fume thereof nearest resembling the
3 horrible stygian smoke of the pit that is
4 bottomless.

5 That's stronger than what the Surgeon General
6 has to say, and that's how long it's been known. So
7 let's look at the evidence.

8 Let's look at the evidence as to how people
9 were bombarded with the fact that cigarettes were
10 bad for you. Did you know that people knew that
11 cigarettes were bad for you in the early 1900s?
12 Sixteen states in the United States banned
13 cigarettes, total prohibition. In the early 1900s,
14 a woman ran for president of the United States on an
15 antismoking platform. Cut out cigarettes.

16 The evidence will be in this case that,
17 starting in the '50s, in this exact time period when
18 the plaintiffs said that our conduct was so bad,
19 that, starting in the '50's, that the newspapers and

20 the magazines just bombarded the United States with
21 information.

22 Before TV, most people in the United States got
23 their information from newspapers and magazines.

24 The number one magazine in the United States in the
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1 1950s and in the 1960s was Reader's Digest. It had
2 the largest circulation of any magazine anywhere.

3 You couldn't go into a dentist's office or a
4 doctor's office or anybody's house and not find
5 Reader's Digest.

6 And the evidence will be that, between 1924 and
7 1964, Reader's Digest had published 36 articles
8 about how bad smoking is for you, 36 articles. And
9 this was before the '64 Surgeon General's report.

10 And what were some of those Readers Digest
11 articles? What were the people of America being
12 told about cigarettes? In December of 1952, Cancer
13 By The Carton. In 1952, July 1954, The Facts Behind
14 the Cigarette Controversy. In 1957, The Facts
15 Behind Filter Tip Cigarettes. In 1962, Lung Cancer
16 and Cigarettes. August of 1963, The Cigarette
17 Controversy; A Storm Is Brewing. That was right
18 before the '64 Surgeon General's report. The
19 Surgeon General's report comes out, bang,
20 cigarettes: Tried and found guilty.

21 Can there be any question, as early as 1964,
22 everybody knew? Now, if you didn't get Readers
23 Digest, you certainly got Life Magazine. What was
24 Life Magazine reporting to people across the United
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1 States?

2 This is an issue from 1953. There will be
3 evidence about these mouse skin paintings where they
4 shaved the back of a mouse and they put tar on the
5 back of a mouse, and that was the first time they
6 had induced any type of a cancer tumor.

7 And this is one of the scientists that was
8 doing this. And these were pictures of the mice.
9 But this wasn't hidden. Here was Life Magazine
10 right on top of it

11 , and Life Magazine says, last week, American
12 smokers pricked up their ears at a piece of medical
13 news that caused a rash of frightening statements
14 from imminent doctors. Cigarettes, smokers heard,
15 had for the first time been shown to be capable of
16 causing cancer. 1953, right out of the box, right
17 after those mouse skin paintings.

18 So when you are thinking about all the conduct
19 they allege the cigarette companies do, remember
20 what everybody already knew.

21 What's another way that people get
22 information? The other way we saw on my chart was
23 the governments. And everybody sort of referred to
24 cigarette warnings, but I really want to get into
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1 them because, if I recall from the voir dire, that
2 some people smoke and some people haven't smoked and
3 some people have quit and et cetera. And perhaps
4 you are not really familiar with all of the
5 warnings.

6 But the federal government has required
7 warnings to be on cigarettes since 1966. All right,

8 from 1966 until 1970, the warning was simply
9 Caution: Cigarette smoking may be hazardous to your
10 health.

11 Now, what's interesting about this is, the
12 federal government knew in 1966, because of the
13 Surgeon General's report, that cigarettes can cause
14 cancer.

15 So they have to make a choice. Do we ban them
16 if they cause cancer or do we allow them to be sold
17 but tell people what the problems may be. And they
18 made the decision that it's a legal problem, adults
19 can make choices, but warn.

20 January 1, 1966, Caution: Cigarette smoking
21 may be hazardous to your health.

22 November 1, 1970, October 11, 1985, Warning:
23 The Surgeon General has determined that cigarette
24 smoking is dangerous to your health.

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1 Then since 1985, Congress has required four
2 rotating warnings to appear on all cigarette packs
3 and advertisements. So that from 1986 forward, if
4 you haven't -- if you are not a cigarette smoker,
5 you wouldn't know that, so I will show you.

6 These warnings go right on the side of these
7 packs. And there are four warnings, and they rotate
8 them every month. So you might buy a pack of
9 cigarettes that has one warning on it one week, and
10 buy another pack and it has a different warning on
11 it.

12 What are the four warnings that the federal
13 government has required, not only on the packs but
14 in all advertising? If you see a billboard, you
15 will see it has one of these warnings. A magazine
16 ad, one of these warnings. Warning number one:
17 Surgeon General's warning: Cigarette smoke contains
18 carbon monoxide; okay?

19 The second warning that may appear on a
20 cigarette pack that you buy if you can read upside-
21 down, is Surgeon General's warning: Smoking by
22 pregnant women may result in fetal injury, premature
23 birth and low birthweight. That's the second
24 warning that you may see. Paragraph on your pack of

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1 cigarettes.

2 The third warning that you may see on your pack
3 of cigarettes or in ads, Surgeon General's warning:
4 Smoking causes lung cancer, heart disease, emphysema
5 and may complicate pregnancy.

6 So the exact diseases that the plaintiffs want
7 medical monitoring for are warned about on the pack,
8 lung cancer, emphysema.

9 The fourth warning from the Surgeon General of
10 the United States is the Surgeon General's warning:
11 Quitting smoking now greatly reduces serious risk to
12 your health.

13 You will note it doesn't say Surgeon General's
14 warning: Medical monitoring now greatly reduces
15 serious risk to your health. It's quitting.

16 The evidence will also be that a lot of what we
17 know and is engrained in our souls comes from songs,
18 movies and TV, particularly today. Someone -- well,
19 let's talk about movies and TV.

20 I'm sure you all remember The Three Stooges.

21 You see them on TV, they have constant reruns, but
22 they were first in the movies. And in 1938 Larry,
23 Curly and Moe had won a contest. And they had won
24 the contest from the Coffin Nail Cigarette Company

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1 on Tobacco Row.

2 What's significant about that? What's
3 significant about that is, as early as 1938,
4 cigarettes were being called coffin nails. They
5 will kill you.

6 It's kind of silly, but that's how you know
7 that it gets into people's mind. Someone once said,
8 I don't care who writes the country's history so
9 long as I can write its songs.

10 Well, the number one song in the United States
11 in 1947 was by Tex Williams, Smoke, Smoke, Smoke
12 that cigarette; I'm going to smoke those cigarettes
13 until I puff myself to death. Engrained, cigarettes
14 can kill you.

15 Movies. Anybody see From Here To Eternity,
16 Frank Sinatra, Montgomery Cliff? Frank Sinatra walks
17 into this bar. Montgomery Cliff is sitting there,
18 and he walks up to Montgomeroy Cliff, and he says,
19 "Give me a nail."

20 He doesn't even have to say coffin nail, and
21 everybody knew it was a cigarette. It was slang
22 within slang. Everybody had become so familiar with
23 coffin nail, Frank Sinatra said, Give me a nail, and
24 everybody knew exactly what he was talking about.

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1 Now, the American Cancer Society, a foremost
2 guardian of the public health in the United States,
3 a foremost protector to let everybody know that
4 cigarettes can cause cancer, started running public
5 service announcements in the '60s and the '70s and
6 the '80s.

7 And just to show you how widespread this
8 knowledge was, I want to play one for you right now
9 that's called You Lose.

10 (A video presentation, reported as follows:

11 "You lose.")

12 MR. SEGAL: Your Honor, may we approach?

13 MR. NEWBOLD: You lose.

14 MR. SEGAL: I have an objection. May we
15 approach?

16 THE COURT: All right.

17 (At sidebar:)

18 MR. RODES: The Your Honor, the point of that
19 video which has never been disclosed to us before.

20 MR. NEWBOLD: Yes, it has.

21 MR. RODES: Has it? I haven't seen it.

22 Anyway, the point of that video is to say that
23 people are taking a gamble. They show people
24 betting things, horse racing other gambling, and

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1 that's a choice issue.

2 They are saying you are taking a gamble, and
3 you are losing. And that's an improper argument to
4 make.

5 MR. NEWBOLD: It's an awareness argument, Your
6 Honor, in our society.

7 MR. RODES: Your Honor, there is lots of
8 information about they were aware of the danger.

9 But the choice issue is involved because they are
10 showing specific gambling behaviors.

11 THE COURT: Well, I have been looking over the
12 curative instruction, and I think the curative
13 instruction will address that. I think there is no
14 question that choice and individual responsibility
15 is a theme of -- has been a theme in the opening
16 statements and has to be put in the right context to
17 the extent it modifies conduct and it affects
18 conduct.

19 I think it may be appropriate. We have to
20 give -- just all the more reason why this
21 instruction has to be given, and I will give it at
22 the close of the opening statements.

23 MR. SEGAL: Can we --

24 THE COURT: The question, of course, at this
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1 point is it's something that's not going to be put
2 into evidence, is it?

3 MR. NEWBOLD: Your Honor, we believe this is a
4 clear awareness type document put out by the
5 American Cancer Society. It's a public service
6 announcement. It was all over the United States.

7 THE COURT: Well, let me say this. I have
8 given great latitude in these opening statements in
9 areas that I never, ever given before for the
10 reasons I have already said.

11 This, I think, has gone too far. At this
12 point, everything that's been referred to at some
13 point is going to be put into evidence. What the
14 plaintiffs showed, and I presume all of this
15 information that the defendants showed up to now.

16 The question I have is: Is that going into
17 evidence?

18 MR. NEWBOLD: Yes, sir. I'm going to have a
19 witness here whose name is Dr. Lacey Ford who is an
20 historian from the University of South Carolina who
21 has testified all over the United States who will
22 testify that part of the general awareness in the
23 United States were public service announcements made
24 by the American Cancer Society.

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1 THE COURT: And that particular one?

2 MR. NEWBOLD: Yes, sir.

3 THE COURT: All right. I'm going to permit
4 it. But I will give the curative instruction you
5 have presented.

6 MR. RODES: Your Honor, we would like to give
7 that instruction again after that's put into
8 evidence as well.

9 THE COURT: May be. Maybe not even that.
10 Maybe even more times than that. As long as it has
11 to be given so that the only thing to be determined
12 in this case is conduct basically and medical
13 monitoring.

14 That's why, while we are up here, I think this
15 sentence was a little -- responsibility, I think
16 it's broader than that. In that part, I believe
17 should be eliminated. Other than that, I think it's
18 appropriate.

19 MR. RODES: And medical monitoring, can we
20 add?

21 THE COURT: I think you already said that. I

22 don't know if you can do it in a fashion that you
23 want to. I think you have already said that.
24 Actually said that here. You said it two or three

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1 different ways.

2 MR. FURR: We weren't given this until a little
3 while ago. I suspect --

4 MR. RODES: You were given that --

5 MR. FURR: May I finish please.

6 MR. RODES: Yes.

7 MR. FURR: I suspect we have some other
8 objections. I don't think this part, technical
9 error, is appropriate, Judge. You can put technical
10 in front of everything. It's whether the
11 requirements have -- they are no more technical than
12 other elements.

13 THE COURT: Well, the legal requirements. Is
14 that all right?

15 MR. FURR: Legal requirements is fine.

16 THE COURT: I do want to give this tonight?

17 MR. NEWBOLD: I'm about halfway through, Judge.

18 THE COURT: I understand, finish up.

19 MR. NEWBOLD: Thank you, Your Honor.

20 (In open court:)

21 THE COURT: All right. You may continue,
22 Mr. Newbold.

23 MR. NEWBOLD: Yes, Your Honor.

24 So the question you might have is: What does

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1 all this national stuff have to do with West
2 Virginia? These are West Virginians. Well, first
3 of all, West Virginia is part of the United States.
4 West Virginians, they watch TV, they get Reader's
5 Digest, West Virginians are part of the great fabric
6 of the United States.

7 But in addition to that, there are very
8 specific things that point out the fact that West
9 Virginians were generally aware of the hazards of
10 tobacco.

11 And first we will go to then the West Virginia
12 Legislature. Here we are in the early 1900s when
13 sixteen states have banned cigarettes. West
14 Virginia had decided it will allow cigarettes to be
15 sold, but that there would be a warning -- there
16 would be restrictions against the sale of tobacco to
17 minors under the age of 21. So West Virginia was on
18 the topic as early as 1913.

19 More importantly, however, are the West
20 Virginia newspapers. And the question is were the
21 West Virginia newspapers, were they as good at
22 reporting things as the Reader's Digest and the Life
23 Magazine?

24 And I'm going to show you a bunch of newspapers

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1 from West Virginia. Here is as early as 1950 in the
2 Wheeling News Register, right here, the hometown
3 newspaper, 1950: Lung, lip, larynx cancer linked to
4 cigarette smoking. Wheeling News Register in 1954,
5 Cigarette smoking most important cause of cancer.

6 The Charleston Gazette, Cigarettes, a killer.
7 In 1954.

8 More newspaper articles in West Virginia.
9 Wheeling Intelligencer, 1954: Doctors link smoking

10 with shorter life; heart disease, cancer take toll
11 of heavy smokers. 1954.
12 1957 when the Wheeling News Register. Four
13 agencies link cancer to smoking.
14 In 1957, the American Cancer Society had the
15 biggest study of all as to whether or not cigarette
16 smoking causes cancer in men. They studied 188,000
17 men, the evidence will be.
18 So the question is, in 1957, did West
19 Virginians hear about the American Cancer Society
20 study? And the answer is yes
21 Reported in the Fairmont Times on June the 5th,
22 1957: Cigarette smoking and cancer linked in four-
23 year study report.

24 This exact same study and report was reported
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1 on the same day in the Wheeling Intelligencer, the
2 Charleston Gazette, the Huntington Herald Dispatch
3 and the Wheeling News Register.

4 The minute it comes out, the minute the
5 American Cancer Society in 1957 says that cigarette
6 smoking and cancer is linked, the people in West
7 Virginia knew.

8 More newspaper articles from the State of West
9 Virginia. The Raleigh Register. 1958, Death high
10 among cigarette smokers.

11 Wheeling News Register, July 1958: New report
12 link cigarettes, cancer; U.S. government plans drive
13 on heavy smoking. This is six years before the
14 Surgeon General's report.

15 1959, Wheeling News Register, tests show
16 cigarette smoking contributes most to cancer.

17 1959, Wheeling News Register, United States
18 agency ties cancer to tobacco.

19 Can there be any question whatsoever that West
20 Virginians knew that cigarette smoking causes
21 cancer?

22 Now, in 1964, the Surgeon General's report came
23 out which, once and for all, as far as the United
24 States government was concerned, smoking caused

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1 cancer. Was it reported here in West Virginia? You
2 bet.

3 Wheeling News Register: Cigarettes held health
4 hazard.

5 Charleston Gazette: Coffin nails; remedial
6 action urged to end smoking hazard. Coffin nails,
7 remember The Three Stooges in 1938. The Herald
8 Dispatch: Smoking principal cause of lung cancer.
9 The Welch Daily News: Smoking, a health hazard.

10 Now, perhaps you wouldn't have time to read all
11 of these articles. So perhaps you only had time to
12 look at the editorial cartoons. And what's great
13 about editorial cartoons is because the editors are
14 trying to capture the absolute essence of what is
15 known and to project that to its readers.

16 And let's look at the editorial cartoons that
17 appeared in the West Virginia newspapers. The
18 Raleigh Register, here is a fellow reading cigarette
19 reports with a black cloud over his head sweating
20 bullets.

21 Charleston Gazette, 1964, the American way of
22 death, skulls with cigarettes in them.

23 A union publication, the Glass Workers News, a
24 new flip top box for smokers, a coffin.

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1 And my favorite, I think, is a picture of this
2 guy driving a truck pulling a high-explosive rocket
3 down a West Virginia mountainside, and the guy in
4 the passenger side says, Take my advice, buddy, and
5 layoff them cigarettes, they are liable to kill you.

6 You would have to be living under a rock not to
7 have known that cigarettes are bad for you.

8 After 1966 or after 1964, the stories kept
9 coming. It didn't stop then.

10 Here is story in the Charleston Gazette in
11 February of 1966, the Kiwanis Club was being
12 addressed. Charlestonians who want to be alive ten
13 years from now should stop smoking cigarettes, a
14 lung disease expert commented Tuesday. Cigarette
15 smoking undoubtedly is the biggest cause of
16 emphysema. 1966.

17 The Charleston Gazette on June the 12th of
18 1966. Dr. Alton Oschner, noted New Orleans surgeon,
19 said Saturday that, quote, to smoke cigarettes is to
20 commit suicide. And he added, a bullet is cheaper
21 and quicker.

22 Now, if you didn't read the newspapers, if you
23 didn't read the magazines, and now it's 1964, you
24 probably watched TV. And back in the 1960s, the big

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1 newscasters were Harry Reasoner and Walter
2 Cronkite. And I want to show you some of the news
3 clips from right after -- in 1964, 1969, and 1979,
4 about what the public was being told about the
5 dangers of smoking.

6 (On video:)

7 This is the CBS news extra on smoking and
8 health, the findings of the Surgeon General's
9 Committee.

10 Almost from the moment that cigarettes
11 were introduced, they were attacked. But the
12 attacks took a new turn ten years ago and
13 culminated in today's report by the Surgeon
14 General's Committee.

15 This in summary is what the committee
16 says.

17 Cigarette smoking is a major cause of
18 lung cancer in men, and data on women smokers
19 points the same way.

20 Cigarette smoking is a significant cause
21 of cancer of the larynx, and probably the most
22 important cause of chronic bronchitis.
23 Cigarette smoking may be related to other lung
24 diseases.

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1 (End of video.)

2 MR. NEWBOLD: That was the evening news across
3 the United States. And that concluded that, quote,
4 in short, the committee says if you smoke cigarettes
5 you increase your chance of dying early. The sooner
6 you start, the more you smoke, the more you inhale,
7 the worse your chances are.

8 Let's see what was said in 1969 on the evening
9 news.

10 (On video:)

11 The Congress released today the Public
12 Health Service says new evidence has been found
13 linking cigarette smoking with a variety of
14 diseases including types of cancer and for the
15 first time noncancerous diseases of the mouth.

16 The report was accompanied by a letter
17 from Welfare Secretary Finch which says
18 cigarette smoking continues to cause much
19 unnecessary disease and death.

20 (End of video.)

21 MR. NEWBOLD: Ten years later 1979, still on
22 the evening news.

23 (On video:)

24 Another set of statistics arguing against
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1 smoking came out today. A study by the state
2 mutual life assurance company says death
3 statistics show that the life expectancy of
4 cigarette smokers is seven years less than
5 nonsmokers, that they die at a rate two and a
6 half times higher than nonsmokers.

7 (End of video.)

8 MR. NEWBOLD: Well, after all of this, after
9 all the newspapers and all the magazines and all the
10 songs and all the movies and all the slang and all
11 the newscasts, did the message get through? Well,
12 let's take a look at some polls.

13 In 1954, George Gallup asked this question:
14 Had you recently heard or read that smoking may be a
15 cause of lung cancer? And as early as 1954, 90
16 percent of Americans said yes, and only 10 percent
17 said no.

18 In 1977, George Gallup went out again. This is
19 only 13 years after the '64 Surgeon General's
20 report. And the question was a little different
21 this time: Do you think that cigarette smoking is
22 or is not harmful to your health? In 1977, 90
23 percent of Americans thought that cigarette smoking
24 was harmful to your health, and only 10 percent said
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1 no.

2 In 1990, that number went up to 96 percent of
3 Americans thought that cigarette smoking was harmful
4 to your health.

5 That is a phenomenal, incredible number, 96
6 percent. To put it in perspective, another poll was
7 run in 1996, and only 70 percent of Americans knew
8 that Al Gore was vice president. And yet in 1990,
9 96 percent of Americans knew that cigarette smoking
10 is harmful to your health.

11 You have heard a lot about public health
12 organizations, and the evidence will be that public
13 health organizations are the guardian and the
14 protectors of health.

15 Did public health organizations think that the
16 message had gotten out, that people knew? In 1957,
17 the Surgeon General said, quote, Our position is
18 that we have informed the public through the
19 excellent coverage of the press, the radio and TV.

20 The American Medical Association in 1964 said,
21 The health hazards of excessive smoking have been
22 well publicized for more than ten years and are
23 common knowledge.

24 Daniel Horn, director of the Clearinghouse for
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1 Smoking and Health in 1968 said, You could stand on
2 a rooftop and shout smoking is dangerous at the top
3 of your lungs, and you would not be telling anyone
4 anything that they do not already know.

5 And finally, the plaintiffs, the plaintiffs
6 themselves will admit through their own witnesses
7 that twenty years ago, 95 percent of Americans were
8 thoroughly informed of the risks of smoking, and 90
9 percent of smokers believed that smoking might be
10 affecting their health.

11 Did the message get through? I don't think
12 there is any question about it.

13 The only question is whether I can reach for my
14 slide. Thank you, Mr. Rodes.

15 As I promised before, I'm the last lawyer, but
16 since I'm sort of the cleanup hitter -- not like
17 Mark McGuire, but like a cleanup hitter I have to
18 sum it up.

19 Because the way we work in our system, these
20 opening statements are now over. Tomorrow we will
21 start hearing evidence. The plaintiff will get to
22 go first and they will put all their evidence on
23 that will last days or longer, or weeks, and we
24 won't come up for a long time. We won't get to put

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1 our evidence on, the tobacco companies, until they
2 are completely finished.

3 So I want you to remember what this case is
4 really about and remember what we talked to you
5 about today.

6 That most of the plaintiffs are current smokers
7 who are not sick and they are not claiming to be
8 addicted. Remember that when you are listening to
9 the evidence.

10 Remember what we just talked about, that
11 smokers have long known the risks of smoking and
12 they don't claim to be misled.

13 Remember, this is a medical monitoring case,
14 and no public health organization recommends what
15 the plaintiffs want to do because it has not been
16 shown to be safe or effective.

17 Remember, yes, cigarettes are inherently risky,
18 like knives that can cut you and guns that can shoot
19 you and fatty food that can mess up your heart, but
20 they are not defective.

21 And remember, for our evidence will be that we
22 make the safest cigarette that is acceptable to a
23 smoker. We are the state of the art in cigarettes.

24 And finally, and I think obviously, quitting

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1 smoking is the key to reducing the health risks of
2 smoking, not medical monitoring.

3 It's only quitting that will reduce your risk
4 of lung cancer. It's only quitting that will
5 prevent you from getting emphysema, and it's only
6 quitting that will stop the progression of
7 emphysema.

8 Quitting smoking is the answer, not medical
9 monitoring.

10 Thank you very much, ladies and gentlemen of
11 the jury. And we and all of my colleagues look

12 forward to presenting this evidence to you. Thank
13 you.

14 THE COURT: All right, thank you all.

15 I will keep or we will all keep our promise and
16 adjourn before 5:00. I do want to, before you leave
17 for this evening, to give you a statement of the
18 law. Let me just explain the context in which this
19 will be given.

20 You recall this morning I told you that at the
21 close of the case, when all the evidence is in, I
22 will give to you what is called the Judge's charge
23 to the jury.

24 I obviously still intend to do that. From time
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1 to time throughout this trial, I may give you pieces
2 of law that will help you understand the evidence.
3 And this is one of those times.

4 Ladies and gentlemen, this Court has previously
5 ordered, prior to the time this trial began, that
6 the trial be bifurcated, which is nothing more than
7 a fancy word meaning it's split into two phases,
8 which means this.

9 That during the first phase of this trial,
10 which is the phase that we are in now, you will
11 concern yourself only with questions concerning the
12 defendants' conduct and whether that conduct was
13 wrongful, as well as whether the legal requirements
14 for medical monitoring have been met.

15 You just heard the opening statement from the
16 defendants relating to public knowledge of the risks
17 of smoking. As I instructed you earlier, this phase
18 of the case is concerned with the defendants'
19 conduct and with the requirements of medical
20 monitoring.

21 Any question concerning the smoker's share of
22 responsibility for their increased risk is reserved
23 for a later phase and is not now before you.
24 Consequently, you are directed to consider evidence

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1 of public knowledge of the risks of smoking only in
2 the context that it reflects on the defendants'
3 conduct.

4 You are instructed that reasons for smoking are
5 not an issue in this phase of the trial. And
6 accordingly, whether defendants' conduct did or did
7 not affect smoking decisions should not enter into
8 your deliberations.

9 All right. We will now adjourn for the
10 evening. Please do not discuss this case among
11 yourselves nor permit anybody to discuss it with
12 you. Don't read about it, don't listen to it, don't
13 watch it, don't do anything. When it comes to the
14 matters that are on trial here, just ignore it.

15 And this is the hardest part. You will go home
16 and somebody at home will say what did you do today,
17 and you will say nothing, I just sat and listened to
18 opening statements, and don't talk about it; all
19 right?

20 See you back here tomorrow morning at 8:30.

21 Let's let the jury leave and then I will come
22 back.

23 (In open court without a jury present:)

24 THE COURT: All right. Be seated.

1 Okay, somebody wants to say something?

2 MR. KLEIN: Yes. Your Honor, I just want to
3 note our exception and objection to the instruction
4 that Your Honor gave to the jury.

5 THE COURT: That is noted, yes, sir.

6 MR. KLEIN: In particular, Your Honor, as with
7 any knowledge or awareness out of the concept of
8 Morningstar and tests of Morningstar, which we
9 object to. I think we have argued this in the
10 past.

11 In addition, Your Honor, I think it was a very
12 one-sided instruction which we didn't have time to
13 address. I think it should have gone on to say when
14 you are setting our conduct into context, to explain
15 to the jury what that means, that you can't withhold
16 something from somebody that somebody already knows,
17 et cetera.

18 For those reasons, Your Honor, we believe -- we
19 object to the curative instruction.

20 THE COURT: All right. Your objection is
21 certainly noted and preserved. That's all I will
22 say. Anything else?

23 See you tomorrow morning at 8:30.

24 (The session adjourns at 4:50 p.m.)